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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 770.

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THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL, AND CITY OF DULUTH,
*Appellants,*

vs.

THE DULUTH STREET RAILWAY COMPANY,
*Respondent.*

---

*(Appeal from the Decree of the District Court of the United States for the District of Minnesota.)*
31493

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## BRIEF FOR THE CITY OF DULUTH

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### STATEMENT OF CASE

This is an appeal by the City of Duluth, Minnesota, from a decree of the District Court of the United States for District of Minnesota, entered January 24th, 1925. It was allowed prior to

taking effect of the Act of Congress of February 13th, 1925. (Record p. 736, fol. 965).

The decree enjoined the schedule of rates to be charged in the City of Duluth by the Duluth Street Railway Company as fixed by the Railroad and Warehouse Commission of Minnesota by its order of July 13th, 1922. 4 Fed. (2nd) p. 543.

And costs, in the sum of $5,000, part of Master's fees, was adjudicated against the City of Duluth, appellant. That schedule has never taken effect, being barred by temporary restraining order issued July 18th, 1922, followed by interlocutory injunction, and by the decree, after trial before a Master and exceptions by City to Master's findings, (Rec. pp. 725-732).

This appeal also directly involves the validity of approximately $200,000.00 worth of coupon rebate tickets, provided for and issued by the Street Railway Company under amended interlocutory injunction order made August 24, 1922. The provision in the order is as follows:

> "It is hereby ordered, That the said order for interlocutory injunction heretofore made and filed herein on the 31st day of July, 1922, be and the same is hereby amended by addition of the proviso and condition of the words and figures as follows, to-wit: Beginning with midnight of the 7th day of September, 1922, and until further order of this court, provision shall be made by the Duluth Street Railway Company for the sale of five tickets for thirty cents, each ticket good for one ride, and accompanying said tickets a coupon issued under and containing the following terms and provisions, to-wit:
>
> "No. .....
>
> Coupon for 5 cents, payable to bearer, transferable by hand and redeemable by the Duluth Street Railway Company, on presentation, if and when the order of the Railroad and Warehouse Commission of Minnesota, bearing

date July 13, 1922, on final hearing in the case of Duluth Street Railway Company, complainant vs. the Railroad and Warehouse Commission of Minnesota, and its members, and the City of Duluth, defendants, now pending in the U. S. District Court, District of Minnesota, shall be sustained in its allowance of five rides for 25 cents, or in the event that said action shall be dismissed on final decree or on appeal; but if said order of the State Commission in allowing five (5) rides for 25 cents is not so sustained, then this coupon shall be void."

The full order is printed as certified to the clerk of this court at pages 119-120 of Transcript of Record Case No. 696 of October Term of this court for 1922 (File No. 29246). This case between the same parties on appeal from the interlocutory judgment order was displaced by this pending appeal.

At the opening of trial before the Master August 13, 1923, (R. p. 74) the amount of such impounded money was $72,-991.23 (R. 73-74). It continued to accumulate until the decree stopped it (Subdiv. 6 Decree Record p. 734) to-wit: January 24, 1925. At that time it is assumed to have reached at least the sum of $200,000.00.

(A question cannot be considered "moot" which directly involves the present validity of $200,000.00 of coupon rebate tickets held by car riders under orders herein of the Federal Court, dependent on the expressed contingency, viz., "If the action shall be dismissed on final decree, *or an appeal*").

Designation, under paragraph 9 of Rule 11, of Points here made by the City, is found at pp. 742-746 of Printed Record, I. to VIII. inclusive.

In brief they are:

(1) The City's motions to dismiss the Bill for want of equity ought to have been granted; that it was brought

in violation of the respondents' contract with the State and City of Duluth, evidenced by Chapter 278, Laws of Minnesota of 1921, the terms of which were proposed, and accepted and consented to by complainant in writing. Without such consent its terms were not binding on either the City or the Street Railway.

(The Act in question is called "Brooks-Coleman" Act. It is printed in full at end of Brief of Co-appellant, Attorney General of the State of Minnesota, filed herein, and need not here therefore be reprinted).

It is Sections 4816-4830, G. S. 1923.

(2) By its Bill and the injunctions it has deprived the City of Duluth of its clear rights, under section 10 of the contract, to a hearing in the State Court on the City's appeal taken in July, 1922, to the District Court of St. Louis County, Minnesota, from the same order of the Commissioner, viz., of July 13th, 1922. Such appeal is still pending unheard, barred by the injunctions.

(3) That no Federal question exists in the case on the facts; and no proper basis for Federal jurisdiction, because the Brooks-Coleman Act when formally consented to in writing became a "Contract" between the City and Company as to manner of fixing fares.

(4) That, in any case, complainant should have been, and should be required to exhaust its rights given by the Brooks-Coleman Act before the Commission and State Courts, before it should be heard in Federal Court, to raise any alleged Federal questions.

(5) That, in any case, no "clear" case of "confiscation" was shown in the record; for the evidence is persua-

sive that, including annual depreciation, the net return on any fair value would be not less than 11%.

(6) That *final* injunction should not have been decreed, in the absence, here existing, of practical test by experience of the result of the schedule of rates, approved and fixed by an impartial State tribunal, the Railroad and Warehouse Commission of Minnesota; that, in any case, the Bill should have dismissed *"without prejudice"*, for actual test of the schedule.

These questions were raised and argued on motions to the Court, and at trial and on exceptions taken to the Master's findings (Record pp. 725-732); and are herein urged.

Assignments of error covering said points were made and filed. (Original 968; not printed).

The Duluth Street Railway Company, complainant, is a Minnesota corporation. (Petition and Record, p. 1, par. 2). All parties to this controversy were and are Minnesota citizens. It operated under the terms of a franchise granted by special act of the legislature of the State of Minnesota in 1881 (Special Laws, Chap. 200 Ex. Session), formally accepted in writing by the Street Railway Company, and under certain ordinance franchises granted under legislative authority by villages which afterwards were incorporated as part of the City of Duluth, which ordinances were formally accepted by the Street Railway Company, all pleaded in its Bill, (Record, p. 2). The main franchise had operation for fifty years, to expire in 1931. It was by its terms a *"contract"* (Sec. 16 thereof) so determined by the Minnesota Supreme Court, in numerous cases; and in the City of Duluth vs. Duluth Street Railway Company, 137 Minn. 286., the Court says: (p. 294)

> "To this franchise not only plaintiff and defendant, but also the state was, in express terms, a party, and all three are bound by the terms thereof."

The Act was not to take effect *unless acceptance was filed by the company within thirty days after passage of the Act,* (Sec. 16 thereof). This was done.

Said Section is as follows:

Acceptance by the Company.

"Section 16. Within thirty (30) days from the passage of this act, said company will file with the secretary of state of Minnesota, and with the recorder of the village of Duluth, a written acceptance of the grants hereinbefore made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted the same shall operate as a contract between the state and the village and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges and franchises whatever."

(Sec. 16, Chap. 200 Session Laws of Minn. of 1881, Extra Session).

Likewise the Brooks-Coleman Act (Chap. 278 Gen. Laws of Minn. for 1921) was proposed through efforts of certain Street Railway Companies, as a modification of the existing franchises of street railways *when accepted by such street railways of the state as might file a formal written "declaration and consent"* to its terms (Sec. 2 thereof). The Duluth Street Railway Company formally accepted the terms proposed in the Act by filing its written "declaration and consent" thereto on April 28, 1921 (see Petition and Record p. 3, par. 4). The form of the acceptance is shown in full as Exhibit A, attached to the complaint, at pages 13 and 14 of the Record. It says:

"and consents that the terms of said Chapter 278 shall apply to and govern the ownership, control, management,

maintenance and operation of the street railway property of the said Duluth Street Railway Company."

Folio 22, Re d p. 14.

The said Brooks-Coleman Act, thus accepted by it, did not annul or cancel the existing franchise contract of the Duluth Street Railway Company. Its old franchise is still in full force as a contract except only as *expressly modified by the terms of the Act.*

For Section 2 of the Act is as follows:

"Every grant that has been heretofore, or that shall be hereafter, made to a street railway by the state or any city shall become and it shall thereafter be, an indeterminate permit, upon such street railway executing and filing with the clerk of the city in which said street railway is located, a written declaration that it desires that such grant shall become on indeterminate permit and *consent that the terms of this Act shall apply to and govern the ownership control, management, maintenance and operation of the street railway property* of said street railway. Upon such street railway filing such declaration *and consent,* the city clerk shall issue to such street railway a certificate that such declaration and consent has been filed in his office. When such certificate shall be filed with the Secretary of State such grant subject to the provisions of this Act *shall become an indeterminate permit to own, operate, manage* and control any street railway property, or any part thereof, within such city *under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; but all of the terms, conditions and obligations of such existing grant, except as herein otherwise specifically provided, shall continue*

*in force* so long as such indeterminate permit shall continue. Such indeterminate permit shall continue in full force unless and until the city shall acquire the street railway property of such street railway within the limits of such city, or unless terminated or modified by the Legislature of the State of Minnesota as hereinafter provided."

The rate which the Duluth Street Railway had been charging for fares was 5 cents (R. Petition p. 17, par. 14); and the provisions of Section 8 of the Brooks-Coleman Act contained the following provision:

"The rates which the street railway is authorized to charge and collect under the existing franchise shall be and remain the authorized and lawful charge until a rate is fixed by the Commission *under the provisions of this Act* * * * and thereafter the Commission may, on its own initiative, and shall, upon application of the city or street railway, from time to time make such investigation as to any change in property value or cost of service as may be reasonably necessary, and after a full hearing, as herein provided, make such order confirming existing rates or changing rates as may be just to properly regulate rates of fare hereunder."

A manifestly important stipulation of the Act was that any order of the Commission was appealable by either party, city or street railway, to the particular District Court of the county in which the street railway was situated, in this case of St. Louis County, sitting in Duluth (Sec. 10, Chap. 278). The appeal was to be taken and all proceedings thereunder had, *as provided by Sections 4191-4199,* both inclusive, General Statutes of Minnesota for 1913, so far as the same were applicable. These are *Sections 4650-4658, General Statutes 1923.*

See Statutes reprinted at end of this Brief.

Either party could apply to the District Court for an order staying and superseding the order appealed from (Sec. 4651, General Statutes 1923; Sec. 4192, G. S. 1913). Such a stay has been granted on application of City of Duluth as against an earlier order of the Commission affecting the Duluth Street Railway Company, dated August 29th, 1921 (Record p. 48).

As to speed of review:

The appeal must be made *within 30 days* by service on the Secretary of the Commission (Sec. 4191, G. S. 1913, which is Section 4650, G. S. 1923).

The secretary shall *forthwith* file with the Clerk of the District Court to which the appeal is taken a copy of the order and all findings.

Persons serving notice of appeal shall, *within 5 days after* the service, file the same, with proof of service, with the Clerk of the Court to which appeal is taken. (Sec. 4651, G. S. 1923).

Such an appeal "shall take *precedence of all other matters except criminal cases;*" and "shall be tried *summarily* by the court" (Sec. 4655, G. S. 1923).

If appeal is taken from the decision of the District Court to the Supreme Court, it "shall be *immediately* entered on the calendar and heard upon such notice as the Court may prescribe" (Sec. 4659 G. S. 1923; also, same language at the end of Section 10 of the Brooks-Coleman Act).

When the District Court has made its findings, which must cover *"all material facts"*, and, specifically, *"valuation"* and "reasonable rate of return", (which are the dominating facts) (Section 10), it is then provided:

> "The judgment or any order of said court *shall be certified to said Commission,* and the Commission *shall*

*thereupon* modify, reverse or *put into effect its order or findings so as to conform to* the judgment, order and *findings* of such court."

Thus, the Commission has not discharged its full duties in fixing the fares under the Act, "as provided therein", until it shall have issued its final order conformable to the directions of the Court on appeal taken; and, meanwhile, it is provided that the old franchise rate of five cents shall remain in force and effect until a rate has been "fixed by the Commission under the provisions of this Act" (Section 8) which necessarily means "fixed under *all* the provisions of the act", including any suspension or stay order, and including the delays necessary to its final order.

An order of the Commission fixing the schedule of fares to be charged was made July 13, 1922 (R., p. 26). It *increased* the cash fare from 5 cents to 6 cents; *but provided for sale of tokens giving five rides for 25 cents.*

The City of Duluth appealed from this order to the District Court of St. Louis County, on July 25th, 1922; i. e. *before it became an Intervenor in the pending case* (Par. XIV. of Answer of Railroad & Warehouse Commission, Record p. 36, filed July 29th, 1922; Record p. 27, f. 43) but has never been able to bring its appeal to trial. It was prevented by the Duluth Street Railway from doing so, having become Intervenor herein (Record original p. 53) by reason of the interlocutory injunction issued, which was followed by the final decree (Record, pp. 732, 735) herein appealed from (Record p. 736).

The Duluth Street Railway Company did not appeal from the Commission's order of July 13th, 1922 to the District Court of St. Louis County (Record 141). *Neither did it apply to the said Court for an order staying or superseding the Commission's order,* which it was at liberty to do under the state statute.

Instead, on July 18th, 1922 it filed its bill of complaint in the Federal Court at Minneapolis, Minnesota, alleging confiscation of its property thereby, contrary to Section 10 of Article 1 of the U. S. Constitution, and of Section 1 of Article XIV of its amendments, and obtained a Restraining Order which was followed by a temporary injunction, the effect of which was to *strike out that part of the order which allowed the purchase of five rides for 25 cents,* leaving the rate a flat 6 cent cash fare, as *raised* by the Commission.

Thus, the bill was filed and Restraining Order issued within five days after the filing of the order of the Commission; and *13 days prior to August 1st, 1922, when, by its terms. it was to take effect* (R. p. 26 at end). After trial before Master, and exceptions taken and argued, decree was made *eliminating the provision for sale of tokens for five rides for 25 cents,* and enjoining any fare less than or more than 6 cents *"until further order of the Court,"* or "until reasonable rates of fare should be fixed by the Commission" (Record pp. 733, 734, par. 5).

The injunction itself prevents defendants from interfering with any rate of fare *"not exceeding 6 cents"* (Record 736 at top).

Motion of City of Duluth to dismiss the bill was made (and denied), Record 54, "as not stating a cause of action cognizable in equity"; and specifying that the Brooks-Coleman Act, pleaded in the petition, when accepted by the Duluth Street Railway Company by filing its "declaration and consent" (Exhibit A of the complaint) was a contract so shown on the face of Bill, and mutually binding on the parties plaintiff and defendant to have the issues submitted to the Commission, and to the District and Supreme Courts, as provided in Section 10 of the Act; and to abide by the fare to be so fixed, whether 5 cents or more (F. 77, R. 54).

The City's answer made similar defense (R. 47, 2nd par. XVII). The allegation of the bill (par. 20, R. p. 11) claiming "no adequate remedy at law" was put in issue and denied (Answer par. XIII, p. 44).

Like objection by the city to introducton of evidence by complainant was made at the trial (R. 59, 60, 61); and because "the agreement was * * * ignored and violated by the street railway company in seeking jurisdiction in the Federal Courts, in ignoring and overlooking and failing to take any appeal to the state courts on the order of July 13, 1922" (R. 61).

## SPECIFICATIONS OF ERROR

Appellant City of Duluth relies upon the errors assigned at time of allowance of its appeal (Original record pp. 968, et seq. not printed) and on the Points numbered I. to VII. inclusive, set out in the printed record at pages 742-746).

## ARGUMENT

It is the contention of the appellant City of Duluth that the decree should be reversed, the injunction set aside and the bill dismissed for lack of Federal jurisdiction, as existing either at the time of the filing of the bill, *or since.*

If not so, then that the principles of comity and convenience require such result, deferring jurisdiction until the Duluth Street Railway Company should have applied for and exhausted its rights under the state statutes of Minnesota, as set out in the Brooks-Coleman Act.

Further, there was failure of proof to show a "clear" case of "confiscation"; and, in any case, the Bill should have been dismissed "without prejudice" in absence of any trial of the schedule of rates fixed.

As necessary result, the City will not be compelled to pay the $5,000, assessed against it as costs, and will be allowed to a hearing on appeal from the Commission's order, as per its contract rights, or from any later order, without erroneous assumption of jurisdiction by a Federal Judge; and about $200,000 of issued coupon rebate tickets will be validated to the holders.

The specific main contentions of appellant, City of Duluth, are three, viz:

(1) That the Federal question of confiscation pleaded by petitioner does not here arise, and is "immaterial"; because all rights here are fixed by contract between the parties as shown on the face of the petitioner's bill. That Federal jurisdiction does not exist.

In Minnesota, street railways are not under compulsory regulation as to rates of fare. It is all matter of contract.

It is submitted that these facts distinguish all the known cases of successful attack, made under claim of confiscation of property upon order of a State Commission fixing rates, whether the Federal jurisdiction has been asserted prior to, or subsequent to the exhaustion of the remedies given by state statutes; and that such fact puts the present case in the class by itself, unlike any other case where Federal jurisdiction has been sustained.

(2) That in any case, fixed principles of comity and convenience required the suspension of the Duluth Street Railway Company's application to the Federal Court until it had applied for relief to the state courts, and commission as provided in the Brooks-Coleman Act; and until it had exhausted its remedies of review and correction therein given.

(3) That, as set out in Point III. (record, page 744) *final injunction by decree* should not have been granted, in view of the record and points IV., V., VI. and VII., (Record, pp. 745, 746), until a practical test by experience had been made for an adequate time of the rates established by the Commission's order; whereas the schedule as ordered was at once enjoined. In other words, that the bill on the facts in evidence should have been dismissed "without prejudice".

## I.

THE BROOKS-COLEMAN ACT, WHEN ACCEPTED BY THE DULUTH STREET RAILWAY COMPANY BY FORMAL WRITTEN DECLARATION AND CONSENT TO ABIDE BY ITS TERMS, BECAME, LIKE ITS ORIGINAL FRANCHISE UNDER CHAPTER 200, EXTRA SESSION, 1881, A CONTRACT, MUTUALLY BINDING ON THE PARTIES IN INTEREST THERETO.

City of Duluth vs. Duluth St. Ry. Co., 137 Minn. 286, supra.

Dartmouth College Case.

So as to municipal ordinances, granted under legislative authority.

Public Service Commission vs. St. Cloud, 265 U. S. 352, and numerous cases therein cited.

Georgia Ry. and Power Co. vs. Town of Decatur, 262, U. S. 432 (43 S. C. 613).

Henderson Water Co. vs. Corp. Com. of N. C. 269 U. S. 278.

In City of Duluth vs. R. & Warehouse Commission, 209 N. W. Rep. p. 10 (May, 1926), the Minnesota Supreme Court has

held that the provisions of Sec. 10 of the Brooks-Coleman Act are valid and binding under the Constitution of the State of Minnesota. Under this decision, it necessarily follows that the whole Act, treated as a contract, must be treated as a *valid* contract under the laws of Minnesota; for this court follows the construction put by a State Supreme Court upon the Statutes and Constitution of the State.

This court said in the cited Georgia case:

> "The contract being valid, we are not concerned with the question whether the stipulated rates are confiscatory", citing cases.

It necessarily follows, that such is the rule, where the contract specifies the method of fixing the rates, the times and manner of doing it. Here in case of appeal by either party the *final fixing* cannot be arrived at *"as provided in the Act,"* until the District Court has certified its findings to the Commission. (Sec. 10).

No Federal question exists in such case, and no Federal jurisdiction. Such is submitted to be the case here.

1. There is ample consideration to the Duluth Street Railway Company for its written acceptance of the proposition incorporated and offered to it in the Brooks-Coleman Act.

The two fundamental benefits were (1st), its escape from the limitation of its existing franchise, under Ch. 200, Special Laws, extra Session 1881, which expired in 1931.

By the modification proposed, its rights became an "indeterminate permit" to occupy the city streets, which would continue until the City of Duluth should buy the railroad (Sec. 2), etc. (2nd.) Another extremely important consideration to the Street Railway Company was *the opportunity thereby opened to escape from its fixed limit of a 5-cent fare.* Its hope was to

increase its net revenue by the new method of fare fixing, agreed to; although under the operation of said Act, a fare lower than five cents may accrue, under the terms of the Act, under increased business or changing conditions (Sec. 8).

When examination of the other stipulations of the Act is made, it is seen how thoroughly the contractual element appears throughout. In terms, under section 2 thereof, all the terms of its pre-existing "grant" continue in force, except as "expressly provided" in the Act. Under the existing franchise contract, the City of Duluth had no effective control over extensions of the railway system, nor over its equipment, style of cars or schedules. But by Sec. 4 of the new agreement the City Council was given controlling power over these matters; and it was specifically agreed that the Street Railway Company could take no appeal from the orders of the Council in respect thereto (Section 4, at end). One of the items of agreement was that in determining "value" no account should be taken of the existing franchise held by the company (Sec. 3, 2nd paragraph). Another was that the existing rate of 5 cents should continue until changed, *as provided in the Act* (Sec. 8). Another was that without claim of damages against it, the state, as a party, was entitled to amend, modify or repeal the Act, the effect of which would be to leave the Street Railway Company under the contract limitations existing before the Act was accepted (Sec. 14).

Under all these circumstances, and in view of these stipulations, it would seem futile for the Duluth Street Railway Company to claim that the Brooks-Coleman Act, thus modifying its existing franchise, is not also, as that was (City of Duluth vs. Street Railway, 137 Minn. 286) a contract in the full acceptance of the term, limiting its rights, and granting rights to the adverse party, the City of Duluth. If so, it cannot be allowed to accept the benefits and repudiate its obligations; nor to deny to its adverse party, the City of Duluth, the rights

therein expressly covenanted, one of which was the right to have reviewed by appeal, if taken by the City within thirty days, (as was here done) any order fixing rates made by the Commission; whereas under the facts, it is seen that the rights of the City of Duluth so asserted have been repudiated and blocked by the proceedings here taken by the plaintiff in the Federal Court.

2. Treated as a contract, *it is one solely between citizens of the same state, Minnesota.* Therefore no question here arises growing out of diverse citizenship of the parties. The rule forbidding discrimination against citizens of other states and foreign corporations and attempting to compel, as against the citizens and corporations of other states, the exclusive use of the state courts has, therefore, no application here.

3. Certainly it is competent for the legislature to compel, and for its citizens to contract, that in cases of dispute, the hearing thereof shall be limited to certain places and courts and in respect to amounts, and by other stipulations as to original or appellate jurisdiction and review. It has never been supposed that such laws of the state were open to legitimate criticism as being either illegal or unreasonable. Therefore it is not a subject of successful attack that this contract between citizens of the State of Minnesota provides that if either of the parties should be dissatisfied with the preliminary order of the Commission fixing rates, appeal and review should be had in the District Court of St. Louis County; and in the manner therein specified; and subject to appeal to the Supreme Court of the State. Nothing herein offends against the Federal constitutional rights of the Duluth Street Railway Company. The matter pertains exclusively to the rights of citizens of the same state, governed by the state law, and covered by a specific contract between themselves.

The Supreme Court of Minnesota has recently held that there is nothing invalid in section 10 of the Brooks-Coleman

Act, providing for such appeal and review; that it is not a violation of the constitution of the State of Minnesota.

City of Duluth vs. Railroad & Warehouse Commission, 209 N. W. 10 (May, 1926).

See Hall vs. Geiger-Jones Co. 242 U. S. 539, holding that "the fact that the statute designates a particular court to review the executive findings does not affect the validity", i. e. of the Blue-Sky statute of Ohio.

See John vs. Paulin, 231 U. S. 583, where this court said, "The State law and practice in this regard are no less applicable *when Federal rights are in controversy* than when the case turns entirely upon questions of local or general law".

If so, *where no contractual element exists,* certainly here, such provisions are reasonable and valid where specific valid contract exists, expressly providing for speedy review by the District Court of St. Louis County, Minn., of the rate making orders of the Commission, upon appeal *by either party to the contract.*

This Court is therefore, asked to reach a conclusion, which may be expressed in substance as follows, somewhat closely paraphrasing its own language in Henderson Water Co. vs. Corporation Commission, 269 U. S., 278, viz:

"Prior to the passage of the Brooks-Coleman Act, Chapter 278 Laws of Minn. 1921, the Duluth Street Railway Company had been bound by the terms of a contract with the City of Duluth, contained in its franchise, to carry all passengers at the fixed rate of 5 cents up to the year 1931. 'Under its original franchise it was not entitled to any judicial relief from the 5-cent fare, however inadequate the rate.' "

Columbus Ry. Power & Light Co. vs. Columbus, 249 U. S. 399.

Opelika vs. Opelika Sewer Co., 265 U. S. 215.

Public Service Co. vs. St. Cloud, 265 U. S. 352.

Georgia Power Co. vs. Town of Decatur, 262 U. S. 432.

Henderson Co. vs. Corp. Com. of N. C. 269 U. S. 278.

"The Brooks-Coleman Act of 1921 was a modification of said franchise offered by the legislature to the Duluth Street Railway Company for its acceptance, and was formally accepted in writing; and the Duluth Street Railway Company thereby became bound to all the terms of its said modified franchise, having all the elements of a contract made upon adequate consideration.

"It was only by securing a waiver of its original franchise rate of 5 cents, by order of the Commission speaking for the State, as reviewed by the State courts on appeal, under the terms of the Act, that the Street Railway Company could have any standing to ask for a fixing of rates in excess of the 5-cent franchise rate. It was therefore plainly within the power and discretion of the legislature to fix all the conditions to be attached to such 'waiver'. When these conditions were agreed to by the Street Railway Company, as was done by its filing the "declaration and consent", pursuant to the Act, its stipulations, also, became a plain contract, binding upon both parties thereto. Among many other items agreed to, all being plain matters of contract, the method of fixing the fare was agreed to. It might be more, or might be less than five cents, according to facts to be found. After the granting of partial relief by an increase of the cash fare rate, as was done thru a tentative order of the Commission, it was a proper and lawful matter of contract between the parties that further delays in the same proceedings might occur in case either party in

interest, the Duluth Street Railway Company or the City of Duluth, was dissatisfied with the new schedule; and that such fixing was to be subject to "suspension" by court order, and to review, with all reasonable dispatch, by the District Court of St. Louis County, Minnesota. It was expressly agreed that said court should then make findings upon "valuation", "reasonable rate of return", operating expenses and revenues, upon "all material facts", and that it should certify those findings back to the Commission for incorporation, unmodified, in its final order, thus *finally fixing the rate of fare.* Also either party in interest could have review by the *Supreme* Court. It was in this special way that the legislature, by stipulations agreed to by the Street Railway Company, 'determined to what extent its said "waiver" of the old 5-cent franchise rate should go'.

"No constitutional right of the Duluth Street Railway Company to be protected against confiscation could exist under such circumstances, for the method of fixing the fare, *including the necessary delays in so doing,* were matters of express contract binding upon it." Such are the conclusions, in substance, which appellant asks this court to reach.

The Duluth Street Railway Company especially was going beyond its rights under the contract, and actually deprived its adverse party, the City of Duluth, of its rights under the contract, when thru the temporary and permanent injunctions herein it successfully blocked prosecution by the city of its appeal taken in July, 1922, to the District Court of St. Louis County, made from the *same* order of the Commission.

It thus broke faith with the State, and the City of Duluth. It violated its agreement. It did not come to the Federal Court with clean hands. There is want of equity in the bill of complaint.

The City's appeal has never been brought to hearing because prevented by the injunctions. It had the right of inter-

vention as real party in interest, so recognized by the Act, and could not afford to ignore it. As intervenor, it has exhausted every effort to have the Bill dismissed.

*If the decree is affirmed by this court, the city's contract right of appeal and review under the Act remains permanently blocked and lost;* for by the decree the Federal court retains jurisdiction "until further order of the court", or *"until the establishment by the Railroad and Warehouse Commission of the State of Minnesota of just and reasonable rates of fare for the transportation of passengers upon the street cars in the city of Duluth"* (R. 734 at top).

This last quoted provision of the decree necessarily means the same as the first; i. e., "until further order of the Court"; for it clearly expresses intent to reserve right and jurisdiction *in the present action to determine whether or not any later rate,* also to be fixed by the Commission in the future, is *"just and reasonable".*

Thus under the terms of the decree appealed from, all parties are held under exclusive Federal jurisdiction; and no part of the provisions of section 10 of the Act, vital to the contract, can be given effect, *now or in the future.*

On such facts it is respectfully submitted to this court that want of equity is conclusively established, requiring the reversal of the decree and the dismissal of the bill.

In using this language, the Decree clearly exceeds Federal authority. That court has nothing to do with *"just and reasonable rates".* Its sole jurisdiction, in any proper case, is confined to barring rates which are *"confiscatory."* It seems evident that the trial court was proceeding on an erroneous theory in its decree.

It is to be noted in the Henderson Water Co. case, 269 U.S. 278, though in an important respect analogous to the present, there

was involved no specific "consent and agreement" of the Water Company, like that here, evidenced by the "declaration and consent" of the street railway company to all the stipulations of the statute. The North Carolina statute, creating the Commission, like those of other states generally, was a compulsory law, a flat regulation by statute, nothing more. No contractual element exists. Even so, this court distinguished the Henderson case from the Prentis case and from the Oklahoma case cited in it, *because of the pre-existing franchise contract fixing a schedule of charges.* Where the Commission had increased the charges, with conditions, this court and the trial court held that Federal interference did not *at once* accrue upon date of Commission's order; *that it should be deferred by delays deemed reasonable for practical test of the order and for exhaustion of the remedy provided in the statute and order;* and this court affirmed a dismissal of the bill, *because no application was made for the relief provided.*

It is respectfully submitted that similar reasons exist, and others stronger, than in the Henderson case, leading to a dismissal of the Bill of the Duluth Street railway company.

Here was a like former franchise contract fixing a rate of charge (5 cents). It was *increased* to a cash fare of 6 cents by the Commission's order of July 13th, 1922, also providing for a ticket rate. The legislative "waiver" of the fixed rate of 5 cents was made on *conditions,* which provided for reasonable delays, of operation and for a *final* fixing (Section 10) by the Commission. Opportunity also existed for *changes* on reapplication to the Commission on good cause shown. But above all, every provision of the Act was matter of specific contract, formally accepted in language too clear and certain for doubt.

Under the authority of the Henderson case, and the Columbus and the St. Cloud and Georgia cases and others cited in them, it is respectfully submitted that, being matter of express contract, the question of "confiscation" under the Federal

Constitution does not exist, or properly arise, in the case at bar. It is an issue, "immaterial".

No such vital element, of contract relationship, as here, existed in any of the cases of purely statutory regulation of Public Service Corporations, such as

The Prentis case, 211 U. S. 210.
The Russell (Oklahoma) case, 261 U. S. 290.
The Kuykendall (Washington) case, 265 U. S. 196.
The Prendergast case, 262 U. S. 43.

or in any similar case of compulsory statutes of other states regulating public utility rates.

In Minnesota, *street railways are not under compulsory regulation* as rates of fare. *It is matter of contract.*

The pending case is, therefore, as compared with those from other states having compulsory regulation of rates of fare, sui generis. Also, in many of the cases from other states, involving rates the Federal jurisdiction was specially based on *diversity of citizenship.*

Here the controversy is limited to citzens of the same state, and arises under local state statutes.

The Minnesota Supreme Court, in City of Duluth vs. Railroad and Warehouse Commission, 209 N. W., 10, said of the proposition that the terms of the Act constituted a "contract": "That proposition is not in the case". Their thought was, and the fact is, that the sole question in that case was the constitutionality under the Minnesota constitution, of section 10 of the Act, as being or not being in violation of the prohibition against imposing legislative and administrative duties upon the judiciary. But it sustained the validity of section 10, and held the whole Act to be constitutional and valid.

The whole Act, so being held valid, by the Minnesota Supreme Court, it necessarily results, that when accepted, it being a "contract," it is a *valid* contract, binding on the parties to it.

There is, thus, no Federal question here, and no Federal jurisdiction.

The trial court in its decree put its decision, establishing jurisdiction and failing to dismiss the bill, on the ground that the question must be determined independently of said section 10, in terms as follows:

> "The conclusions heretofore reached are adhered to: That when the Railroad and Warehouse Commission made and filed its findings, and order of July 13, 1922, fixing the rate of fare for plaintiff company, the legislative stage was ended at that point and the judicial stage was reached; that the hearing in the State District Court on appeal, which was provided for in section 10 of the Act (Chap. 278, Laws 1921, State of Minn.) is judicial and not a continuation of the legislative rate-making process, *otherwise the section is void;* and finally, that under such circumstances the street railway company had the right to bring the present suit in the Federal Court". (4 Fed. (2nd) 543, opinion; point 1, P. U. R. 1925 D. p. 231).

It is respectfully submitted to this court that the trial court vitally erred in its said conclusions:

(1st) In holding that if given effect, according to its terms, said section 10 would be void; for section 10 was affirmed as a valid provision by the Minnesota Supreme Court, as above shown;

(2nd) It erred in that it failed to give effect to the terms of the Act (including section 10, as a valid provision) *and as a contract between the parties, mutually binding;* thus eliminating Federal jurisdiction;

(3rd) Because it assumed that Federal jurisdiction should accrue *immediately* upon the filing of the Commission's order of July 13, 1922, thus ignoring the delays granted by the Act and contract, *which were reasonable delays,* in case either party wished a review by appeal. Even in absence of *contract* for delay, Federal right of interference does not accrue *at once.*

Henderson Water Co. vs. Corp. Comm. of N. C. 269 U. S. 278.

(4th) Because it offended against the principles of "comity and convenience" enforced as matter of right and law in favor of the jurisdiction of the state court, where adequate remedies are provided for the complaining party through local state statutes, as here; and because the Duluth Street Railway Company did not apply for and has not exhausted its remedies so given.

This point will be discussed as Part II. of this brief.

(5th) Because the effect of the decree and injunction is to *bar permanently any hearing and review on the City's pending appeal, by the District Court of St. Louis County, Minnesota,* of the rate-fixing order of the Commission made under said Act; and also, *of any future rate-making order under said Act;* for jurisdiction is retained under the terms of the decree until the Federal Court shall determine what shall be *"reasonable rates" later attempted to be fixed by any order of the Commission;* or, as comprehensively expressed in it, "until further order of the court"; thereby this case would not be "moot", in case, on new conditions, the Commission should make a new and later order as to rates.

Such conclusion necessarily implies that the Federal Court will ultimately determine what rates are "just and reasonable", which is not its proper function. It is only entitled to enjoin *"confiscatory"* rates.

Such conclusion also necessarily emasculates the State Statute. It has prevented one of the parties to the controversy, the

City of Duluth, from availing itself of its terms; and will continue to do so in the future. In other words, the necessary effect of the decree is to nullify a vital part of the state statute; to materially change the contract of the parties, and to destroy the rights of one of the parties, the City of Duluth, thereunder.

Finally, (6th) because on the evidence it ignored the principle that *final* injunction should not be granted, but that the bill should be dismissed "without prejudice", *in cases where no practical test* of the schedule of rates fixed has been allowed, in cases like this (See Points III., IV., V., VI. and VII. Record pp. 744-5-6); where all material facts are in serious dispute; where reasonable doubt, at least, exists; and the case of alleged "confiscation" is not at all clear; but the great weight of evidence, and all the presumptions are in favor of the validity of the Commission's order.

The last point (6th) will be discussed in part III. of this brief.

## II.

*While disclaiming the existence of any Federal question or Federal jurisdiction, under the facts, Appellant further submits that fixed principles of comity and convenience should have deferred Federal jurisdiction until the Duluth Street Railway Company had exhausted its rights and the specific remedies given it under the local statutes of Minnesota.*

The method thereof is speedy and summary and the delays stipulated are not unreasonable.

Henderson Water Company vs. Commonwealth, 269 U. S. 278, as above shown, is authority that Federal jurisdiction does not in all cases accrue *at once* upon the making of a Commission's order fixing rates.

Prentis vs. Atlantic Coast Line Co., 211 U. S. 210.

(and especially the dissenting opinions of Justice Harlan and Chief Justice Fuller therein.)

Central Union Telephone Co. vs. Edwardsville, 269 U. S. 190

Gorham Manfg. Co. vs. Tax Comm. of New York, 266 U. S. 265

Keokuk vs. Hamilton Bridge Co., 258 U. S. 122

Farncomb vs. Denver, 252 U. S. 7, 10.

Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481

And see John vs. Paulin, 231 U. S. 583 and cases cited.

The delays provided in the Act, before *final fixing* of the rate by the Commission, were not unreasonable, even assuming the existence of a Federal Constitutional Right, (which appellant claims does not here exist under the contractual relationship of the parties).

It is respectfully submitted that the rule applied by the Court in habeas corpus cases affecting life and immediate liberty, limiting review until exhaustion of remedies in state courts, and the like rule in matters of taxes and assessments against property involving immediate enforcement, and perhaps in other cases, should likewise have operation in cases like that at bar affecting mere property claims arising under state laws giving special remedies to parties, citizens of the same state.

In 1908, the Court said in the Prentis case, supra, (*where no contractual relationship existed*)

"Considerations of comity and convenience have led this court ordinarily to decline to interfere in habeas cor-

pus where the petitioner had open to him a Writ of Error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ."

Chief Justice Fuller in the said Prentis case thought, instead of holding the case in mere *abeyance*, as the majority of the court held, that the Bill should have been *dismissed*, and said:

"Power grows by what it feeds on, and to hold that state railroad companies can take their chances for the fixing of rates in accordance with their views in a tribunal provided for that purpose by State Constitution and laws, and then, if dissatisfied with the result, decline to seek a review in the highest court of the state, though possessed of the absolute right to do so, and invoke the power of the Federal courts to put a stop to such proceedings, *is, in my opinion, utterly inadmissable and of palpably dangerous tendency.*"

It seems that, certainly, as to citizens of the same state, as here, and where the contractual relationship exists, such conclusion is inescapable.

Justice Harlan in the same case said:

"It is suggested that, under this view, there is danger that rights granted or secured by the Constitution may be violated by the judgment of the Commission or by the judgment of the court of appeals of Virginia. A conclusive answer to this suggestion is that, if the final action of the commission, in any case of rate-making, amounts to confiscation of the property of the corporation whose rates are regulated, and therefore is to be held wanting in due process of law as taking private property for public use

without just compensation, and if such action be sustained by the highest court of Virginia, then the way is plainly open to bring that question to this court upon writ of error. Rev. Stat. Sec. 709 U. S. Comp. Stat. 1901 p. 575. In this way any Federal right, specially set up and denied by the state tribunals, can be adequately protected by the final judgment of this court."

The thought seems to be that the remedies in the state tribunals are adequate, seeing state courts are likewise bound to protect Federal rights; and that resultant delays for review and correction by local tribunals are not unreasonable; and that there is want of equity in a Bill where complainant ignores these remedies so provided by the local statutes.

Such was the holding in the recent case of

Henderson Water Co. vs. Corporation Commission of North Carolina, 269 U. S. 278, supra,

where this court held that a bill in equity in the Federal Court was properly dismissed where it alleged confiscation of property under an order of a state commission *which had increased by one-half the lower charges allowed to the Company under an antecedent franchise contract.* The dismissal was because the complainant had not taken advantage of the remedy allowed to it by the local law, to-wit: by making a *re-application* to the Commission for further relief after a test period to determine whether or not the rates fixed by it would prove adequate.

It is submitted that like reasons exist here for dismissal and reversal of the decree; also additional reasons, not present in the Henderson case, viz: that here citizens of the same state have solemnly contracted as per the specific provisions of the Act; and that the conduct of complainant, in violation thereof, has, up to date, successfully barred the con-

tractual rights claimed by the City of Duluth, Appellant, under its pending appeal to the state court for review of same order of the Commission of July 13, 1922; *and under the terms of the decree, if not reversed, such condition will be permanent.*

The Attorney General of the State of Minnesota is authority for the statement that there would not have been twelve votes in the Minnesota legislature for the passage of the Brooks-Coleman Act had it been understood that its provisions would not be carried out, and that Federal court interference would be applied for and obtained, by a street railway, with resultant defeat of the specific right of review given to the cities.

It is a matter of public scandal that the Duluth Street Railway Company should have repudiated its agreement made in the Brooks-Coleman Act, providing for correction and revision of the vital facts by the state courts, at least in the first instance, upon appeal to be taken by either party.

In the Keokuk case, 258 U. S. 122, supra, the Court says:

> "But the bill failed to show that plaintiff was being deprived of property without due process of law, or was being denied equal protection of the law, or that there was any danger it would be. Compare Wells vs. Nevada, 248 U. S. 165, 168. The laws of Illinois afforded ample opportunity to question the amount and validity of an assessment, both before administrative tribunals *and in the courts.*"

The Syllabus Number 2 contains the following statement:

> "A bill in the District Court to enjoin enforcement of a state tax, as based on a discriminatory over-valuation, which fails to show that plaintiff availed himself of presumably adequate remedies offered by state law * * * should be dismissed for want of equity."

Certainly, there can be no presumption here that the local courts of Minnesota, District and Supreme, would not have protected the Duluth Street Railway Co. against "confiscation" of the property, if it had appealed to them, thus respecting its obligations, under its contract.

In Central Union Telephone Company vs. City of Edwardsville, 269 U. S. 190, the Court, construing an Illinois statute, held that by failure of the complainant to exercise an option as to choice of courts given by the Illinois statute, it had, under the Illinois decisions, waived *the right of access to the Federal courts.* Therefore, this Court refused to consider the Federal constitutional points raised, and dismissed the bill. And so in other cases above cited.

Should not the same rule be applied here, under the stipulation of the agreement italicized in Sec. 4192 of Appendix hereto?

Here, the parties in interest are all citizens of the same state, and Federal jurisdiction, based on diverse citizenship does not exist.

Here, in Minnesota, Street Railways, are not, as in some jurisdictions, under compulsory, or Police Regulation, as to Rates. The matter of rates, as above shown, is here matter of *contract relationship,* voluntarily entered into by the Duluth Street Railway Company.

## III.

This Branch of the Brief will make five main points.

(1) Rulings of the United States Supreme Court require dismissal of the Bill, at least "without prejudice" until practical test has been made of the untried rates. (See pages 40-56 hereof).

(2) Proper valuation should not exceed $3,800,000. (See pages 57-73 hereof).

(3) An annual rate of return at Duluth, Minnesota, of 6% on a fair valuation, in addition to 2½% as depreciation annuity, is not "confiscatory". (See pages 73-86 hereof).

(4) The normal annual expenses of operation estimated by the Master at $1,078,671.42 and affirmed by the trial court should be further reduced; and should not exceed $986,668.07, *exclusive* of taxes, state and Federal. (See pages 86-103 hereof).

(5) The results of a practical and fair test of the rates fixed by the Commission would, with reasonable certainty, under the evidence, be an annual net revenue, in excess of 8½% on the valuation as fixed by the Commission and approved by the Master; and including depreciation annuity of 2½%, would be not less than a total of 11%; and the increase of value made by the trial court, in the net sum of $409,531.78, (viz. $5,009,510) would not materially change said result. (See pages 104-125 hereof).

I. THE PLAINTIFF'S BILL SHOULD BE DISMISSED, AT THE LEAST, "WITHOUT PREJUDICE".

1) Because the plaintiff has failed to show that the rate established is confiscatory.

2) Because the plaintiff has failed to sustain the burden of proof upon each and all of the relevant facts necessary to overthrow the strong presumptions in favor of the rates established.

3) Because no practical test of the rates established has been made, it being prevented by restraining order and interlocutory injunction.

4) Because there is entire failure of plaintiff to show "that it was impossible for a fair-minded administrative board to come to the conclusion that it reached" as to the adequacy of its rate established.

5) Because it is a matter of mere conjecture, from the plaintiff's standpoint, and supported solely by the biased "estimates" of the plaintiff's manager, that a practical test would not result in proving that the rate was adequate.

6) Because no *final* injunction should issue against a legislative rate except in a clear case of confiscation.

7) Because final injunction should not issue where the result of the operation of the rate is wholly speculative and uncertain; or where the result appears to be so close to the dividing line between what is and what is not confiscatory as to demonstrate the necessity of a practical test, before declaring the rate to be confiscatory.

8) Because, (to say the least, and from the plaintiff's standpoint exclusively), the findings of the Commission, and the findings of the Master, and the evidence in this case, put this case in a class where the dividing line between alleged confiscation and a compensatory rate is too close and the margin too narrow to justify final injunction against the legislative rate, prior to the test of experience.

9) Because "fair and reasonable doubt" exists touching the validity of the findings of the Commission and of the Master as to *value* of the property as to whether or not it is excessively high; and the same doubt exists as to *operating* costs, and as to the *results of the untried rates,* when, if ever, they go into operation, especially in view of a properly reduced annual Rate of Return, appropriate to conditions at Duluth, Minnesota.

10) Because it is the claim of the City, substantiated by evidence that both Master and the Commission failed to give proper consideration to the claims of the City, that the total value should not exceed $3,800,000; as affecting very many of the elements entering into the total valuation, to-wit: as to the value of land; as to the amount to be allowed for *overheads,* both in original cost and in theory of reproduction; as to the

amount of *going concern value;* and failure existed to make due allowance for measure or value represented in the *tax valuation of the State,* $3,444,916; and in value based on the amount and market value of the stocks and bonds, $3,719,000; and for the plaintiff's own claims under oath of the officers as to value of the property in contested tax proceedings; placed at less than $2,700,000; and in other respects all important and all involved in dispute. (See Exceptions of Master's report; R. pp. 725-731; also Answer in Intervention of City of Duluth, (R. pp. 37-47).

11) Because, even assuming the value as stated by the Commission and as stated by the Master, which is the same, viz., $4,599,978.22, no specific per cent or rate of annual return at Duluth, Minnesota, is found by the Master as fair or normal; but such is a vital fact, material to the determination; and it is a question of fact *subject to judicial review;* whereas the Master refused to make a finding of fact upon the point on the erroneous ground that the fixing of such annual rate or per-cent was a *legislative* matter exclusively, and was not subject to judicial review; *and that he was bound by the finding of the Commission that* 7½% *annual return was a fair,* just and reasonable rate of annual return; and he could not raise or lower it; although he reports that it should not be increased; whereas it is the claim of the City that the evidence conclusively shows that such rate of 7½% of annual return is *excessive* as applied to Duluth and its locality; and that a much less rate of an annual return would not be confiscatory; and that an annual rate of return of 6% would not be confiscatory; as shown by the undisputed evidence; and if effect were given to this one fact, *it would alone dominate and control the whole result of this litigation; for it* would show affirmatively and beyond all doubt that the net revenues of the Company would be compensatory, and not confiscatory, under the schedule of rates established by the Commission. The difference in money be-

tween 7½% and 6% on the Commission's valuation is *$69,000.* Exception was taken to failure of Master to find as a fact what was the fair rate of return at Duluth, or vicinity, on analogous investments, and the trial court overruled the City's said exception.

12) Because although the 12 months' period succeeding the Commission's Order threw some light upon the *operating costs* of the plaintiff, yet error was committed by the Master in his findings of proper normal annual operating costs by allowing an excessive amount therefor, in a sum of not less than $92,003.35, which findings were approved by the court. That if the proper amount only were allowed, it would appear that the net revenue of the Company would be such in amount as to clearly demonstrate lack of confiscation in the rate established; or would, at least show a result so close and the margin so narrow, as to compel placing the case in that class where final injunction is denied prior to the practical test of experience, viz., (See pages 86-103 hereof).

(a) Because both the Commission and the Master and the court allowed an excessive amount as operating costs under the head of annual depreciation allowance or annuity in the sum of at least $28,000.

(b) Because the Master in his estimate improperly allowed as operating costs the amount of $42,158.69 growing out of an increased regular schedule of service put into operation by the Company without authority and in violation of the law, affirmed by the trial court; being also a schedule not before the Commission.

(c) Because the Master improperly allowed in operating costs the sum of $3,000 for attorneys' fees, resulting from this pending Federal litigation.

(d) Because the Master improperly allowed in his estimate of operating costs the annual sum of $11,415.24, the one-fifth (1/5th) amortized part of the total expense of the special

valuation proceeding taken before the Railroad and Warehouse Commission by the Plaintiff.

(e) Because the Master refused to follow the decision of the Railroad & Warehouse Commission limiting the annual normal expense for removing snow and ice to the sum of $5,000, and improperly allowed to the plaintiff in his estimate of annual operating costs an additional sum of $4,341.09.

(f) Because the Master improperly included in his estimate of operating costs an excessive amount for maintenance of bridges and culverts in the sum of $2,203.92.

(g) Because the Master in his estimate of operating costs refused to deduct the further sum of $1,060 paid by plaintiff to the Railroad & Warehouse Commission as its expenses in the valuation proceeding.

(h) Because the Master improperly allowed other items, as operating costs.

Many of the above items approved, without individual discussion by the court in its opinion.

13) Because, if proper normal operating costs and those only were allowed, it would clearly appear that the net revenue of the Company under a flat six cent rate, recommended by the Master, and court, would be excessive, unreasonable and unjust to the public and far in excess of 7½% return upon the valuation found by the Master and by the Commission (which is itself excessive); and by the court; or if not so, yet such result would clearly demonstrate that the operation of the schedule of rates of the Commission was not confiscatory; or if not so, it would, at least, place the case in a position where the result would be so close to the dividing line and the margin so narrow as between confiscation and non-confiscation as would, under proper rules of law, require the dismissal of this Bill and denial of injunction prior to practical test of experience of the Commission's rates.

14.) Because no evidence in the record justifies a conclusion that the Commission was in error *in its estimate that the rate established would prove adequate* to comply with the demands of the law, viz., that the return to the Company would be *"just and reasonable;"* and because, far less would it justify a conclusion that such result would operate to *"confiscate"* the property of the plaintiff, if a practical test of its rate should be made.

15.) Because the evidence before the Master justifies a conclusion that a practical test of the order established by the Commission would produce a rate of return of not less than 8% upon the Commission's valuation, exclusive of depreciation annuity; and the same on the court's valuation. See pages 104-125 hereof).

(a) Because the proof shows that the experience of 72 cities in the United States having a combination cash fare and ticket rate, showed the average payment of *one-third* (1/3rd) of the total number of fares, as *cash* fares, and only two-thirds (2/3rds) as ticket fares, i. e. an average payment of 5 1/3rd cents a fare.

(b) Because, with the option to the people preserved to ride for 5 cents as provided in the order (5 rides for 25 cents), there would have been no loss to the Street Railway Company in number of revenue passengers through the Commission's order. The number would have reached 28,000,000 at least.

(c) Because the enforced increased rate of flat *6 cents by Federal interlocutory injunction,* was, it was generally felt, obtained by the Company in violation of the spirit and terms of the Brooks-Coleman law, a contract with the public, which provides an appeal to the State Courts, and this in itself had provoked resentment and animosity among the people which, combined with their desire and inability to ride for the former rate of 5 cents, caused an imme-

diate and immense loss of revenue passengers to the Street Railway Company, of not les than 3,000,000 revenue passengers per year, resulting from the immediate, enormous, successful invasion of jitney competition, furnishing rides for 5 cents.

(d) Because the population of the City has steadily increased each year, and its business prosperity has increased, to the extent that in one single item, to-wit: the number of revenue passengers that the Street Railway carried in the 12 months succeeding the Commission's order *in so-called special service*, not on regular schedule, furnished to *special entertainments, concerts, ball games, theaters, etc.*, reached a number properly to be estimated at not less than 1,015,000 in excess of the number carried in 1921 under like schedules and like conditions; 126,909 more car miles were used for such specific purposes than in 1921, the "regular schedule" being the same.

(e) Because such facts, and other facts in evidence, viz., showing that the *average* of revenue passengers carried for 1919, 1920 and 1921 exceeded 28,000,000 justifies a conclusion that under the Commission's order, there would have been carried not less than 28,000,000 in the 12 months succeeding the making of the order, had it not been suspended by the Federal injunction, establishing the flat 6 cent fare.

(f) Because such facts demonstrated that under the rate established by the Commission's order, the Company would have been more prosperous than it has been under existing conditions; that conditions in Duluth are specially favorable to successful operation of the Street Railway.

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This Court has repeatedly said that it would not sustain or allow final injunction against the legislative rates established by administrative boards or commissions, unless it

was impossible for a fair minded board to come to the conclusion which it reached; whereas it is utterly impossible for any person justly to conclude that the acts of the Railroad & Warehouse Commission of Minnesota in its order here attacked were the acts of a board not fair-minded. It follows that final injunction cannot here be issued without violation of the basic principle established by definite rule of this Court.

The above language was used and the same conclusion reached by the Supreme Court in

San Diego Land & Town Co. vs. Jasper, 189 U. S. 439, (23 S. C. R. at p. 574, *1902*). The Bill was dismissed.

Also, in Knoxville vs. Knoxville, 212 U. S. 1, (The Bill was dismissed) (*1908*).

Also, in Van Dyke vs. Geary, 244 U. S. 39 (37 Sup. Ct. Rep. at p. 483) in *1916*.

The principle has never been revoked, nor modified and has been the rule of action of the court for many years to the present time.

> "It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." 189 U. S. 439, supra.

The same language was quoted with approval in the Knoxville case, 212 U. S. 1 (1908), and the bill was dismissed.

Again in Van Dyke vs. Geary, 244 U. S. 39, 37 S. C. R. at p. 483, the court said:

> "The case is presented to us on contradictory affidavits dealing with items of value which go to make up the water system. *We cannot say that it was impossible for a fair-minded board to come to the result which was reached.*"

By virtue of this specific rule, we here ask decree dismissing plaintiff's Bill.

Injunction should not issue against legislative rates except in very clear cases of confiscation.

It is never to be issued in a case where fair, just and reasonable doubt exists, affecting value, operating costs, or probable results.

It is never to be issued where the rates have not been put into operation, where the probable results are uncertain or speculative. In such cases, the court will dismiss the bill "without prejudice", giving plaintiff an opportunity to commence new proceedings after a practical test has been made of the schedule established.

It is never issued when the probable results are close to the dividing line, or where there is a narrow margin between confiscation, and non-confiscation, in absence of actual test for a proper period of time.

San Diego Land Co. vs. National City, 174 U. S. 739, 19 S. C. R. 804 (1902).

San Diego Co. vs. Jasper, 189 U. S. 439. Bill Dismissed.

Ex Parte Young, 209 U. S. 123, Bill Dismissed;

Knoxville vs. Knoxville Water Co. 212 U. S. 1 (29 S. C. R. 148) (*1908*)-Bill Dismissed;

Wilcox vs. Consolidated Gas Co. 212 U. S. 19 (29 S. C. R. 192) 1909-Bill dismissed without prejudice;

Van Dyke vs. Geary, 244 U. S. 39 (37 S. C. R. 483) (*1916*). Bill dismissed without prejudice;

Lincoln Gas Co. vs. Lincoln, 250 U. S. 256. Same result.

Darnell vs. Edwards, 244 U. S. 564 (37 S. C. R. 701) Dismissed without prejudice. Conditions too "abnormal" for fair test.

City of Louisville vs. Cumberland Tel. & Telephone Co. 225 U. S. 430 (32 S. C. R. 741)-Bill dismissed without prejudice, Evidence left case *"too much in the air"* for injunction.

Galveston Electric Co. vs. Galveston, 258 U. S. 388 (42 S. C. R. 351), Bill dismissed without prejudice;

Same case, United States Dist. Court 272 Fed. 147;

Brush Electric Co. vs. Galveston, *262* U. S. *443*, 43 S. C. R. 606. Bill dismissed without prejudice.

Georgia Power Co. vs. Commission, 43 S. C. R. 680. (1923), *262* U. S. *625*.

In the Knoxville case, supra, the Court said:

"Where the case rests, as it does here not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, *we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; The inferences were based upon the operations of the* preceding year; and the conclusion of the court below rested *upon that most unsatisfactory eveidence, the testimony of expert witnesses employed by the parties.* The city authorities acted in good faith, and they tried without success, to obtain from the company a statement of its property, capitalization, and earnings."

There is striking similarity in these remarks to the facts and situation in the case at bar.

Again the Court said:

"The jurisliction which is invoked here ought, as has been said to be exercised *only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States.* In Ex Parte Young, 209 U. S. 123, the last word of caution by the court was said (p. 166): 'Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal Courts a great flood of litigation of this character, where a Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the the state, either criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted *unless in a case reasonably free from doubt. We think such a rule is, and will be, followed by all the judges of the Federal Courts.*"

Then the court goes on to say:

"The same thought in effect was expressed in San Diego Land & Town Co. vs. National City, 174 U. S. 739: 'Judicial interference should never occur unless the case presents, *clearly and beyond all doubt,* such a flagrant attack upon the right of property under the guise of regulations as to compel the court to say *that the rates prescribed*

*will necessarily have the effect to deny just compensation for private property taken for the public use.'"*

And then the court says:

"And in San Diego Land & Town Co. vs. Jasper, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we cannot say that it was impossible for a fairminded board to come to the result which was reached.*'"

In the Knoxville case the ordinance establishing water rates was enacted on March 30, 1901. The court says: (p. 152)

"The Company has never observed the ordinance. The suit was begun 9 months after its enactment and tried considerably later."

After citing as above shown the previous decisions of the Court showing their reluctance to enjoin legislative rates, and that it must be a clear case where they do, the Court says:

"But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event would be substantially 6% or 4% after an allowance of 2% for depreciation. * * * *We cannot know clearly that the revenue would not much exceed that return.* We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation."

And finally the Court says:

> *"If hereafter it shall appear under the actual operation of the ordinance,* that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. *But,* as the case now stands, *there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation.* For these reasons the decree is reversed and the case remanded to the Court below with directions to dismiss the bill without prejudice."

The ultimate facts in the Knoxville case strongly resemble those here, and the same principles should apply.

In the present case the rate fixed by the Railroad Commission was not allowed to go into effect and did not go into effect. It was restrained three and one-half days after its making. What its effect actually would be if in operation becomes necessarily purely a matter of speculation. The valuation of the property is, as in the Knoxville case, greatly disputed. The evidence introduced on behalf of the City as intervenor, shows upon four or five different lines that it should not exceed $3,800,000. The evidence presented on the part of the intervenor shows that the *common and ordinary rate of annual return on capital* in the City of Duluth and in the State of Minnesota, in banking, merchandising, manufacturing, *does not exceed* 6%, (1½% below the 7½% alowed by the order of the Commission) which portion of the order is contested by the City of Duluth, *and it is entitled to a special finding of fact, on this specific point,* because it is a material fact.

*"The expense account"* is not agreed upon; but as to it, there is dispute in regard to important items greatly reducing

the normal operating costs annual and thus increasing the net revenues. The rate has not actually been put into operation. The inferences of the Master were based upon the operation during the 12 months' period succeeding the making of the order, *under a radically different schedule, than that of the order;* and the conditions were shown to be vitally different from those existing in the year 1921 and 1922 and abnormal; and, as in the Knoxville case, the "conclusion that the rate would not be adequate rests upon that most unsatisfactory evidence in this case," that of a single prejudiced witness, to-wit: the Vice-president and General Manager of the Company whose efforts had been expended for many years in trying to increase the rate of fare collected from the people. Here on the contrary no aspersion can be made upon the good faith, consideration, and impartial judgment of the Railroad & Warehouse Commission in its estimate of what its order would produce in the way of revenue. Its conclusions also are supported by convincing evidence. Therefore, under such circumstances, we submit in the language of this court that "It is enough (to defeat the bill of the plaintiff) if it cannot be said that it was impossible for a fairminded board to come to the estimate and the result which was reached" by the Railroad & Warehouse Commission of Minnesota.

It is respectfully submitted that the decree in the present case should follow the decision of the Court in the 12 cases above cited.

Wilcox vs. Consolidated Gas Company decided in 1909, 212 U. S. 19, 29 S. C. R. 192, is peculiarly in point in very many phases. *It reversed the decree of the lower court, with directions to dismiss the bill without prejudice.*

The question involved the constitutionality of two acts of the Legislature fixing a maximum rate for gas in the City of New York at 80c per thousand cubic feet.

The Court said:

"The rule by which to determine the question is pretty well established in this court. The rates must be *plainly* unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. * * * *The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates.* In this case the rates have not been enforced as yet, because the bill herein was filed, and an injunction obtained restraining their enforcement, before they came into actual operation." (p. 195).

The court said the answer to the question involved depended upon a determination of what the value was, and called attention to the fact that value is to a considerable extent a matter of opinion, then says:

"All these matters make questions of value somewhat uncertain; *while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption,*—and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. * * * *But where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation,* as based upon the value of the property found by the court below, and the decision depends upon opinions as to value, which differ considerably among the witnesses, and also upon the re-

sults in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, *a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate,* and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts." (p. 196).

Here, vice versa, the increase of rate to 6c (at same time destroying the option to ride for five tickets for 25 cents, operated to reduce the revenue passengers by not less than *3,000,000 belowthe average for the three previous years!* (See pp. 111-113 hereof).

The Court then took up the question of the value of the property involved and said:

"Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants', it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes a matter of speculation or conjecture to a great extent. It may be, as already suggested, that, in many cases, the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. *But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.*

"In this case a slight reduction in the estimated value of the real estate, plants, and mains, as given by the wit-

nesses for complainant, would give a 6 per cent return upon the total value of the property, as above stated. And again, *increased consumption at the lower rate* might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished. * * *

"The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost *can be answered only by a practical test.* In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, *and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are sufficient.*

"It might possibly be, however, that a practical experience in the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and, in that event, complainants ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree with directions to dismiss the bill without prejudice; and it is so ordered." (p. 201).

As applied to the present case the reasoning of the court in the above cited case is applicable all along the line, to all the facts of the present case. In the case at bar the Court is entitled to consider under the answer of the intervenor, the City of Duluth, its claims of value of the plant and property of the Duluth Street Railway Company as compared with that fixed by the Railroad and Warehouse Commission; as well as compared with the value as claimed by the company; and the Court must be convinced that the question of value is one in

dispute and in doubt, as to numerous important elements. The evidence shows as claimed by the city that the value ought in no case to exceeed the sum of $3,800,000; and should not exceed the sum of $3,500,000.

The facts show that such is a reasonable claim when considered in reference to the various standards and measures of value as declared by the Supreme Court of the United States in Smythe vs. Ames, 169 U. S. and other cases, to-wit: (1) The tax value shown by the evidence to be at "full value in money" as prescribed by statutes of the State of Minnesota the sum of $3,487,436, as fixed by the assessing officers of the state including the State Tax Commission, less $7180.00 as found by the Master, (Record p. 715); and (2) The capitalization of the Company shown to be *$3,719,000* (Master's report, R. p. 715), consisting of issued stock to the extent of $1,200,000 and first and second mortgage bonds to make up the difference. Assuming that this capitalization fairly represents the money expended in the plant at their full face, the said property must still be depreciated, and if depreciation is had to the extent found by the Commission, 17%, the total value on that basis would be *$3,171,000.*

(3). Again treating the value as measured by the market value of stocks and bonds, it is hereby shown that such does not exceed the value of the physical property, viz., $3,487,020 (Scott p. 395). The evidence shows the market value of the bonds ($2,519,882 @ 92% and 82%); bonds to be $2,248,180 (p. 21 Master's finding); (R. p. 714, fol. 906); and when the value of the issued stock, ($1,200,000) (R. p. 714, fol. 906) is added to this and taken at par, (although the evidence showed a less value in 1918, than par, by $124,050 (City's Ex. H, pargrs. 3 and 4), on such basis the total market value of stocks and bonds would be *$3,387,000.*

(4) Again, it is shown by the Company's own claims of value, brought down to the date of the Commission's order in

contested tax proceedings that the value of its property in 1921 would not exceed *$2,700,000.*

(5) Again, it was shown in evidence by proper comparison with the rate base fixed for the Superior Division at $1,225,000, that following the like method, the value for the Duluth division would not exceed $2,933,731. (Rec. p. 452, fol. 583).

But "fair and reasonable doubt" exists not only as to "*value,*" but also as to other controlling factors.

It exists, as to proper, normal, annual operating costs (City's exception No. V, Rec. pp. 727-730). See pages 86-103 hereof. Above all it exists, as to probable results of a practical test by experience of the combination schedule of rates as fixed by the commission. (Above points No. 12-15 inclusive). See pages 104-125 hereof.

The Master's report states the obvious fact, viz., "In the absence of a practical and fair test any estimate must be more or less conjectural." (Master's report, Rec. p. 718, second paragraph.)

There is doubt all along the line as to the justness of the plaintiff's claims. The case is not a clear one from the plaintiff's standpoint. The plaintiff has not sustained the burden of proof cast upon it on every relevant issue. It has not overthrown the strong presumptions that the legislative rates are valid.

It has not shown "that a fairminded Commission could not have come to the result reached by it." Therefore the Bill should be dismissed, in absence of a test of the rates established, at least without prejudice to try again.

In the Lincoln Gas Case, 250 U. S., 256 supra, decided in 1919, the Court said:

> "As early as the month of January, 1909, this court in two notable rate cases, indicated its view of the impor-

> tance, *in any but a very clear case,* of subjecting prescribed rates to the test of practical experience before attacking them in the courts;"

citing the Knoxville case and the Wilcox case supra, and it dismissed the Bill.

It is simply inconceivable that any person of intelligence can properly assert that the evidence in this record makes out a *"very clear case"* of confiscation, under the untried rates; or to assert that confiscation is a "necessary result of those rates."

On the contrary, the gravest doubt as to the propriety of the plaintiff's claim necessarily exists, as to the value, annual rate of return, fair operating costs; and as to practical results of operation of the prescribed rates.

In City of Louisville vs. Cumberland Telephone & Telegraph Company, 225 U. S. 30, 32 S. C. R. 741, *(1912)* the whole syllabus is expressed in the following words:

> "The enforcement of a municipal ordinance fixing telephone rates *should not be enjoined as confiscatory before giving such ordinance a trial to show its actual effect, where the evidence leaves the probable result very close to the dividing line between the yield of fair return and confiscation."*

The case was referred to a Master and he reported in favor of the City. He was of the opinion that in the *first year after the ordinance should go into effect, there would be a loss of $30,000,* but that in another year or so, in view of the probable increase of subscribers the Company would go back to its former net revenue with a probable continued increase thereafter and would earn a sufficient return. The District Judge was of a different opinion; and for the purposes of the

present decision only the United States Supreme Court adopted his figures, subject to the changes it made, but which, the Court says,

> *"Leaves us unprepared to sustain the decree without giving the ordinance a trial to show its actual effect."*

The Court reversed the decree without prejudice to come again, saying:

> "We express no opinion whether to cut this telephone company down to 6% by legislation would or would not be confiscatory. *But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid, void on this ground, and when it is considered how speculative every figure is* that we have set down with delusive exactness, *we are of the opinion that the result is too near the dividing line not to make actual experiment necessary.* The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60% on the value estimated by him. The judge, on assumptions to which we have stated our disagreement, makes the present earnings 5 10/17ths% with a reduction by the ordinance to 3 7/17ths%. *The whole question is too much in the air for us to feel authorized to let the injunction stand. Decree reversed without prejudice."*

The above rule and practice of the Federal Courts is also adopted and followed in like contests in the State Courts.

Municipal Gas Co. vs. Commission, 225 N. Y. 89, 121 N. E. 772, P. U. R. 1919C, 364, 367;

Kings County Lighting Co. vs. Lewis, 180 N. Y. Supp. 570, P. U. R. 1920D-p. 145;

Cedar Rapids Co. vs. Cedar Rapids, 144 *Ia.* 426;
State vs. Adams Express Co., 85 *Neb.* 25;
Storrs vs. Pensacola Rd. Co., 29 *Flor.* 617;
Hardin-Wyandot Co. vs. Commission (*Ohio*) P. U. R. 1924A-p. 122, 140 N. S. 779 (decided June 12, 1923).

and many more that might be cited.

In 225 N. Y. 89, supra, the court said:

> "Thro repeated decisions there runs the consistent thought that in controversies of this order, experience is the final test; that the courts must bide their time and let the workings of the law decide. * * * Bills to annul rates have been dismissed 'without prejudice' while the outcome remains uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event." (Cardozo, Judge).

In the present case Mr. McWethy (specially qualified, Rec. p. 489) testifies to his opinion that on the Commission's valuation, and with adjusted normal operating costs, the Commission's rates if put into effect would produce an annual net return of 8.7% (Record p. 583); further necessary adjustments will make it reach 9.9% exclusive of 2½% depreciation annuity, or 12.20% total. The Commission's impartial judgment was that 7½% net return would accrue.

Certainly, such evidence destroys every possibility of giving controlling effect to the estimates and biased speculations of the Company's manager. It, at least leaves the probable results in fair doubt; which doubt can only properly be solved by actual test of the untried rates.

In the Galveston case, Galveston Electric Company vs. City of Galveston, 258 U. S. 388, 42 S. C. R. p. 351, the Supreme Court affirmed the decree of the lower court.

In it "the Master who heard the case made findings in which he advised that the fare was confiscatory. The district judge who heard the case in January, 1921, found a much smaller base value and much larger net revenues. He stated that *he didn't deem it necessary to determine whether the ordinance would produce exactly 8% or a little more or a little short of it; decreeing that he was not satisfied that the ordinance produced a return so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise* of its rate making function; and in March 1921, entered a decree dismissing the bill without prejudice."

This Court said (par. 10):

"The District judge was obliged to form an opinion as to the probable net earnings in the future. All relevant facts, except as stated, and all applicable arguments were fully and clearly presented by the parties and were carefully considered by the court. Although the district judge treated the master's report as advisory merely, he passed upon the numerous exceptions taken to the Master's findings in order to indicate his view on the precise points raised. He allowed some exceptions and disallowed others. Upon petition for rehearing further careful consideration was given to the case. Views expressed in the first opinion on some matters were modified; but these changes did not call for any change in the decree. The district judge had before him some evidence not before the master; for the company's expert was recalled and testified to both to the result of operations of later months in which there was a large increase in travel, and to the heavy decline in prices which occurred after October.

Concering actual facts, there was substantially no controversy. On the elements to be considered in determining whether the rate would be confiscatory, no error was made which would substantially affect the result. *His determination whether the prescribed rate would be confiscatory was necessarily based largely on a prophecy, for normal conditions had not been restored.* He found that gross revenues were steadily increasing, *and that they were larger under the 5c fare than they had been during the preceding year when the 6c rate was in effect.* He was convinced that operating costs would decrease largely during the year. His two opinions show that every element upon which his prophecy should be based received careful consideration. *We cannot say that the evidence compelled a conviction that the rate would prove inadequate.* Compare San Diego Land & Town Co. vs. National City, 174 U. S. 739; San Diego Land & Town Co. vs. Jaspar, 189 U. S. 439; Knoxville vs. Knoxville Water Co., 212 U. S. 1".

The Georgia case, 43 S. C. R. p. 680, decided June 11, 1923, is in entire conformity with the rules of the cases hereinabove cited and quoted from; it gives overpowering weight to the conclusion of a fair-minded commission in its estimate of what a certain schedule of rates will produce and refused to overturn its conclusion and its estimates as to what its rate of fare established would produce. The court says:

> "In making each of these changes the Commission fixed a rate which is estimated would permit the Company to earn a return of about 8% on the fair value of the property. Each change of rate was made upon careful consideration. *If there was error, it was error in prophecy or error of judgment in passing upon the evidence.* We cannot say that the evidence compels a conviction that the rate would prove inadequate."

It specifically relies for its conclusion upon cases hereinabove cited and quoted from, to-wit: The San Diego case, 174 U. S., the other San Diego case, 189 U. S. 439, and the Knoxville case, 212 U. S. 1 and the Galveston case, 258 U. S. 88.

In the *Missouri Rate cases*, 230 U. S. 474, (33 S. C. R. 975), the United States Supreme Court refused to be bound by the undisputed evidence given as to value for the railroad companies, saying:

> "We are referred to the testimony of two witnesses for the complainants, men of broad experience in railroad affairs, but this consisted of broad estimates. * * * It is clear that testimony of this general character cannot be deemed sufficient to support a finding of confiscation, or to justify the annulment of the legislative acts of the state." (P. 980 S. C. R.).

In the present case the prejudiced estimates and speculations of the *single witness* for the plaintiff, on which alone the Master's recommendation can stand, viz., that of Mr. Warren, *Vice-President and Manager of the Company* stands in no better case than that of witnesses referred to in the Missouri Rate case which was not followed by the United States Supreme Court.

Here the estimates and speculations of Mr. Warren, *sole* witness are also directly met and offset by the considered estimates and judgment of an impartial Commission; and they are supported by the sworn testimony of Mr. McWethy, a trustworthy witness, and by many corroborating facts, as stated in the beginning of this argument, and as more fully set forth at pages 107-109 hereof.

This item will be further discussed in the last branch of this Brief.

## 2. VALUATION

The Court in Smythe vs. Ames, 169 U. S., the rule of which has never been changed has declared that all relevant facts must be given due weight and it named some of them. How much weight shall be given to individual elements is not stated. This leaves the matter to the sound and fair judgment of the tribunal charged with the duty of fixing value. The Master on page 22 of his report (Rec. p. 715) finds various values as follows:

| | |
|---|---|
| Reproduction cost | $ 5,138,504.61 |
| Original cost | 4,222,573.00 |
| Taxable value | 3,437,436.00 |
| Stocks and bonds | 3,719,882.00 |
| The total of this is | $16,518,396.61 |

If these values are averaged and thus divided by four, the resultant value would be $4,129,599.00. This would be giving *equal effect* to each of the said elements.

But the Master apparently gave no effect whatever to the *verified statements of value and claims made by the officials of the Company in the contested tax proceeding,* resulting in the value fixed by the State Tax Commission under its duty to determine the "full value in money" of the property. The claims of the Company would show a value less than $2,700,000 as of approximate date of the Commission's order, to-wit, May 1st, 1921. City's Ex. "C" p. 1-3, par. 4, Com's Ex. BB, table 6, p. 18, City's Ex. "H" (Sworn statement of Secretary of Company, original all in files.) If these claims of the Company were also considered and an average were then taken the result would be as follows:

| | |
|---|---|
| Total value of the 4 values stated by the Master as above | $16,518,395.61 |
| Add the Company's claims of value verified | 2,700,000 |
| And we get the total of | $19,218,395.61 |

Divided by 5, averaging, produces result of *$3,843,679.00.*

Moreover, in this calculation no note, has been taken of the *comparison of the Duluth Division with the Superior Division of the system,* the result of which comparison was shown by undisputed testimony. The rate base for the Superior Division as fixed by the Railroad Commission of the State of Wisconsin in May 1923, was $1,225,000, where the investment in that division represented but 29.31% of the total investment in the system. 70.61% was invested in the Duluth Division. (Rec. p. 452). On this basis, the rate base for the Duluth Division would appear to be $2,933,730. (Rec. p. 452 fol. 583). The Master and Court ignored this measure of value, viz., the considered act of the Railroad Commission of Wisconsin.

Counting this method of comparison *as one of the relevant facts* to be considered, and it ought not to be ignored, the result as to value would then appear as follows:

| | |
|---|---|
| Total of 5 elements above stated equals | $19,218,395.61 |
| To this add value from comparison with Superior Dvision | 2,933,730.00 |
| Total | $22,152,125.61 |

Averaging these 6 elements produces *$3,692,020.93.*

It is respectfully submitted by the counsel for the City of Duluth that a value put at $3,800,000 would be the full and fair

value of the property of the Company at the date of the Commission's order.

It is to be noted that in stating the capitalization, and assuming that every dollar represented by stocks and bonds was honestly expended in the property, no account in the above statements has been taken of *wear and tear* which necessarily resulted; but taking 17% only as the depreciated value of such investment (the percentage found by the Commission) this would reduce the said sum from $3,719,882 to approximately $3,171,000, the depreciation being $548,882.00. Deducting this $548,882 from the total above given at $22,151,395.51 leaves $21,602,513.61.

Now dividing this by 6, averaging all the above stated elements, produces a result and average value *$3,600,418.93.*

It is respectfully submitted therefore that the valuation found by the Master and by the Commission is reasonably shown to be excessive in a sum of from $800,000 to $1,000,000.

For the purpose of making a definite calculation as to net results of the operation of the Commission's order let us assume a valuation of $4,000,000 to be more than fair, where the question involves a confiscatory rate, taking 6½% as an annual return on such assumed but excessive value of $4,000,000.

The result is a net requirement of $260,000, whereas the rates established by the Commission were estimated to produce $85,000 more than this; and the Master's calculation on page 31 of his report, (R. p. 722), though improperly low in estimate of revenue passengers and excessively high in allowance of operating costs, nevertheless produces a result of $87,000 in excess of such 6½% on such assumed valuation of $4,000,000.

This illustration shows, it is respectfully submitted, that the plaintiff's bill in the present case should be dismissed for

absolute failure of proof to show that the Commission's rates confiscate its property.

In addition to authority from the Supreme Court of the United States to the effect *that the taxable value* is one of the elements to be considered; and that the *statements of officials in regard to value* are to be considered as relevant, we cite some additional authorities from the various State Commissions to the same point.

Peck vs. Indianapolis Co. (Ind.) P. U. R. 1916B-445;

In re Charlestown Water Co. (West Virginia) P. U. R. 1916D-725;

Commercial Club vs. Citizens Co. (Ind.) P. U. R. 1916E-1.

See San Diego Co. vs. Jasper, 189 U. S. 439, Syllabus 3.

It is manifest that under the State Statute of Minnesota requiring the assessment to be for *"the full value in money"* (General Statutes 1913 Sections 1987-8), the valuation actually fixed by the assessing authorities of the State is *a peculiarly important element* to be considered.

"Sec. 1987. Valuation of property—All property shall be assessed at *its true and full value in money.* In determining such value, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the said property would sell at auction or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money." * * *

And such of course was the duty of the State Tax Commission in its review.

It is manifest also, where the Duluth Street Railway Company appears in the contested tax proceedings by attorneys and by verified petition as here, and presents affidavits of its officials stating their claims of the utmost value, that such facts become *important elements and relevant facts* to be considered by the Court on the question of value. Here such claim of the Street Railway Company urged a value less than *$2,700,000*, and the value as fixed by the *State Tax Commission* was $3,444,616. The Master deducted $7,180 therefrom and fixed it at *$3,437,436* (R. p. 715).

The City's Brief, filed with Master, covering "Valuation", made no mention of "Cost of Financing" as an element of value.

In the Master's Report, however, he allows $89,075, for such element, both in his estimate of original cost and in his estimate of reproduction cost new (R. p. 713, 710).

## COST OF FINANCING

(A) It is respectfully submitted that such cost should not be considered as part of the rate base. This conclusion is based upon the following cases and the facts in the present case, viz.,

Galveston Electric Co. vs. City of Galveston, 272 Fed. 147, decision of Judge Hutcheson, district judge;
Galveston Electric Co. vs. City of Galveston, 258 U. S. 388 affirming the opinion of Judge Hutcheson;
City of Minneapolis vs. Rand, 285 Fed. 818, decided January 1923 (C. C. A. 8th Circuit);

The Railroad and Warehouse Commission of Minnesota disallowed this item in its opinion and order on the theory that if the Company should receive any consideration on account of moneys so expended, it should be done when fixing the rate of return; *and it made its rate of return* (7½%) *larger on that account, than it otherwise would,*

See also City of Winona vs. Minnesota Power Co. 276 Fed. 996 (Decision of Judge Booth).

Apparently the Master in the present case distinguished the above cited authorities on the ground that it did not specifically appear in evidence in the cited cases *that the sums claimed were in* fact paid by the Company; whereas in the present case it did appear that $89,075 had been paid as cost of financing through bond discounts or otherwise.

It is respectfully submitted that if the reasoning of the Supreme Court of the United States is followed, and that of the Circuit Court of Appeals of the 8th Circuit, it is improper to add anything to the rate base on account of said expenditure of money whether in fact paid, or not paid.

It is evident that the Circuit Court of Appeals gave thorough consideration to the reasoning of the Supreme Court of the United States in the Galveston case cited, and therefore, eliminated the item as part of the rate base. Its language is as follows (285 Fed. 829):

> "The cost of financing is assumed upon the theory that a company desirous of establishing such a plant should not be possessed of sufficient capital to pay for the plant and should be compelled to borrow money by floating securities through brokers, and should be exposed to large discounts, if compelled to obtain money in this way."

And the court answers this as follows:

> "The fair value of the plant should not be estimated upon such a basis of impecuniosity and exactions; but upon the theory, if used, of reconstruction by those financially able to build the plant, paying reasonable prices therefor."

As authority for its conclusion it cites Galveston Electric Company vs. City of Galveston, 258 U. S. 388.

The Circuit Court of Appeals interpreted the decision of the Supreme Court of the United States to mean just that; and that it was "*immaterial*" that the Company might have been subjected to exactions and discounts; or that in any such case discounts and exactions actually made might have been treated as losses, made up by the earnings of the plant or amortized as current expenses. Its syllabus No. 7 applies the reasoning to original construction, and to reconstruction.

It is submitted that all of these reasons apply to the present case and require the exclusion of the said item of $89,075 from the rate base either as cost, or as estimated expense of reproduction new.

When the language of the Supreme Court and its reasoning are carefully considered, it appears that the judgment of the Circuit Court of Appeals is incontestably sound; and that the conclusion of the Master and trial court in this case should be overruled on that point. The language of the Supreme Court of the United States on the point in question relating to the sum of $67,078 for brokerage fees disallowed by the Court, although allowed by the Master, in that case is as follows:

> "(3) The other item included by the master in determining base value, but disallowed by the Court, is $67,078 for brokerage fees. There is no evidence that any sum

was in fact paid as brokerage, and there was included, as above shown, the sum of $73,281 for organization and business management in calculating the historical reproduction cost. The finding of the master rests upon testimony that bankers customarily get, in some form, compensation equal to 4 per cent. on the money procured by them for such enterprises. But compensation for bankers' services is often paid in the lessened price at which they take the company's securities, and is thus represented in the higher rate of interest or dividend paid on the money actually received by the company as capital. The reason given by the Master for including the allowance for an assumed brokerage fee, is that a brokerage fee is 'a normal incident of large industrial investments and has not been amortized, since the record shows that the plant has been operated at a loss.' If base value were to be fixed by the money expended, brokerage fees actually paid might with propriety be included, as are taxes paid pending construction. *But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial.* We cannot say that the court erred in refusing to include in base value an allowance for hypothetical broker's fees."

It is noticed there that the Master had considered such expense as "a normal incident of large industrial enterprises," and in the particular case allowed it because such expenses had not been "amortized, since the record shows that the plant has been operated at a loss." Even if the Master's reasoning had been sound, it would not be properly applied to the facts of the present case because the Duluth Street Railway Company has not been operated at a loss, but has earned and paid large dividends for 20 years last past. (City's Ex. A on file, original by stipulation (original, 990).

But the Supreme Court of the United States did not base its opinion upon such facts, nor on the fact of actual cost incurred, but upon entirely different reasoning, as follows, to-wit:

> "If base *value* were to be fixed by the money *expended*, brokerage fees actually paid might with propriety be included as are taxes paid pending construction. *But as the base value considered is the present value, that value must be measured by money; and the customary cost of obtaining the money is immaterial.*"

The Circuit Court of Appeals based its opinion on said thought expressed by the Supreme Court of the United States and rejected the item of cost of financing as a part of the rate base *upon the broad principle* that the fair value of the plant should not be estimated upon a basis of impecuniosity and exactions, but upon the theory of construction by those financially able to build it and paying reasonable prices therefor."

See also the reasoning of Judge Hutcheson, district judge, in 272 Fed. 147, on like point.

It seems to counsel for the City, also, that the attempt of the Company to place in the rate base an amount representing expenditures for bond issues can be legitimately described in the language of the Supreme Court in the Galveston case in its paragraph 6, which related to the Claim of the Company to a further charge of $29,500 a year on account of what it called "deferred maintenance."

The Court says:

> "This is an attempt in another form to capitalize alleged past losses; and the request was properly refused both by the Master and the Court."

It seems to counsel for the City that this present theory of "Cost of Financing" is, likewise an attempt to capitalize alleged past losses. It belongs to the same class as "developmental costs"; which, in the Galveston cases and later cases, the Supreme Court of the United States has excluded from consideration in the rate base on the theory that "past losses obviously do not tend to prove present values".

For the reasons foregoing and others that might be advanced it is respecfully submitted that error was committed by the Master and court in including the sum of $89,075 for cost of financing in his estimate of cost or in his estimate of what would properly constitute a rate base.

(B) *The Court Added An Excessive Amount As "Present Value" To The Physical Value.*

It was 40%. Opinion 4 Fed. (2nd.) 543 at page 548.

The Master had not made allowance for $663,216.66 which was expended at war prices (City's Ex. L); but the trial court made such deduction and reached the figure of $2,830,189.00 as base, and then added a clean 40% to that figure, viz., $1,132,075.00, *as actual "present value"*.

See opinion, where the figures are stated. The $2,830,189, was found by the court by deducting $663,216 (additions made at war prices 1916-1921, City's Ex. L,) from the figure of $3,493,405, stated by the court as "undepreciated value less land", viz., $3,493,405—$663,216=$2,830,189.

It is respectfully submitted that such 40% added is excessive and should not be approved, for the four following reasons:

(1) Most important of all, because simple enhanced cost is not "value." It is merely one of the relevant facts or ele-

ments to be considered in determining value as to which a judgment is to be excercised on all the facts.

(2) *Because the Commission fairly used its judgment and gave weight to all factors entering into value, without excluding any of them, and gave due consideration to the factor of present enhanced costs on a theory of Reproduction New.*

It did not overlook nor ignore it, but weighed it; and counsel for plaintiff concedes that a percentage of at least *12.99%* was covered by the Commission's order on said account on its found value.

It is in such respect, that the case here differs radically from the Bell Telephone Company Case and from the Bluefield case; for in each of those cases the lower tribunal *had wholly failed or refused to give any effect whatever to the enhanced cost, and used "investment" as sole basis of value.*

No such error of law here is found. If mistake occurred, it is one of "judgment" by a fair minded tribunal duly considering every element affecting value. The court ought not to disturb such judgment.

(3) *Because to so add 40% or $1,132,675 (40% on $2,830,-189) as the trial court did is an extreme position and ought not to be taken in fairness to the public.*

*It is extreme in that it goes far beyond any similar action ever approved in any case by this Court, even when they are dealing with higher costs* than were prevailing in the pending case, at time of Commission's order.

(a) This court approved a decree, limiting such addition to *33 1/3%* of value of *physical property* as applied to prices of 1919, 1920, in the Galveston case supra, decided May 15, 1922. (R. p. 433-434, Gifford).

( b) This court went no further than *22.4%* in its conclusion as to such additions, cost or value in the Southwestern

Bell Telephone case, 262 U. S. 276, as applied to prices in 1919, 1920. (R. p. 438-439, Gifford).

*Galveston case basis. (258 U. S. 388)*

| | | |
|---|---|---|
| Take Master's figures as starting point, viz. (R. p. 712, City's Ex. L, original on file.) | | $3,493,405.00 |
| Deduct (additions 1916--1921) | | 663,216.00 |
| | | $2,830,189.00 |
| Add 33 1/3, as in Galveston case (R. p. 433-434, Gifford) | | 943,396.00 |
| | | 3,773,585.00 |
| Depreciate 17% | | 641,507.45 |
| | | 3,132,077.55 |
| Add property acquired to December 1, 1921 | | 6,978.00 |
| | | $3,139,055.55 |
| Land | $ 128,474.00 | |
| Cost of financing | 89,075.00 | |
| Materials, etc. | 105,000.00 | |
| Working capital | 30,000.00 | |
| Going concern value | 350,000.00 | |
| Overheads | 369,641.00 | |
| Deduct | $1,072,190.00 | 1,072,190.00 |
| | | $4,211,245.55 |
| Restore | | 663,216.66 |
| Total on Master's figures | | $4,874,462.21 |

| | | |
|---|---|---|
| But deduct | $150,000 | G. C. Value (leaving it at $200,000) |
| Cost of Financing | 89,075 | |
| | $239,075 | $ 239,075.00 |

*Proper* total reproduction cost on basis of 33 1/3rd% (Galveston case) ..... $4,635,387.21

*This is approximately the Commission's final value.*

*Bell case 22.4% added,* (262 U. S. 276).

| | |
|---|---|
| | $3,493,405.00 |
| Deduct | 663,216.00 |
| | 2,830,189.00 |
| Add 22.4% (Bell case) (R. p. 439, 438, Gifford) | 633,962.33 |
| | 3,464.151.33 |
| Depreciate 17% | 588,905.70 |
| | 2,875,245.63 |
| Add land, etc. as above | 1,072,190.00 |
| | 3,947,435.63 |
| Restore | 663,216.00 |
| Total reproduction | $4,610,651.63 |
| Add | 6,978.00 |
| As per Master, on basis of *Bell Case* | $4,617,629.63 |
| But deduct for G. C. value and cost of financing | 239,075.00 |
| Proper reproduction cost on 22.4% basis *(Bell Case)* | $4,378,554.63 |

*This is far below the final value placed by the Commission and here attacked.*

If the trial court had used the factor of 25%, instead of 40%, as added present value, *this one fact,* would have reduced by 15% his total valuation, by the sum of $424,528.35, ($2,830,-189x.15=$424,528.35). Deducting this sum from the court's valuation (5,009,510—$424,528.35) leaves a corrected valuation of $4,584,981.65.

*This is lower than the valuation fixed by the Commission.*

4). Because authority to justify it is the conclusion reached in the Circuit Court of Appeals in the case of Minneapolis vs. Rand, 285 Fed. 829; *and the facts in that case are notably distinguishable from those in the pending case, as to costs and prices.* In the Rand case the Master had used a 25% increase which the court raised to 50% with dissent on this point by the Circuit Judge Stone. Judge Stone agreed with the Master and trial court as to the 25%; and differed only as to "Going Concern Value," (285 Fed. 831). But note the difference here in the facts. *The Court's effort there was to instruct the receiver as to what to charge on prices in 1920, 1921, 1922, 1923,* under a franchise ordinance requiring rates to be "just and reasonable". It was not a case involving "confiscatory" rates.

Now note the findings in that case as to costs. It cannot be claimed that they are fairly applicable to the facts of the pending case. The Court says: (p. 826 paragraph 5)

> "The evidence is undisputed that the cost prices of this property are far below the market prices of such articles at the end of 1919. The greater portion of it was purchased before 1914, and before the advance of prices incident to the war had begun. It was shown that the prices of labor, and materials, such as are required in the construction of a plant of this nature, had advanced in vary-

ing amounts from 1914 to 1920, many classes having advanced from 100 to 300 per cent. It was shown that between 1910 and 1920, prices of 15 classes of building materials, such as are used by the gas company had increased 139 per cent., skilled labor 92 per cent., common labor 150 per cent., cement 140 per cent., lumber 215 per cent., and common brick 123 per cent. * * *

"The Master also found that the costs of the iron and steel pipe used in the mains of the company had increased 169 per cent., and 124 per cent., since 1910, and that these percentages, if applied to the cost of the mains as found by the city's expert, would result in a sum almost equal to the total valuation placed upon all of the property of the gas company. He also found the cost of gas meters had increased 65 per cent., since 1910, and that everything used by the gas company in its construction work had correspondingly increased in price, so that, if the prices then prevailing were applied to the property of the company, it would result in a valuation between two and three times the valuation he had placed upon it."

*Here is shown in evidence no direct comparison of the materials used, the prices paid for them, with those things appearing in the Gas plant of the Minneapolis Company.*

In absence of such proof and specific evidence, it is merely a wild and unwarranted assumption that the materials are the same, that the prices of labor are the same, or that the percentages of the increased cost are the same in this Street Railway plant as in the said Gas plant.

To do so is a mere begging of the question. It is a discarding of the proper burden of proof and installing guesswork in place of the legal certainty required. Certainly the *51 or 56%* of general increase in 1921 over pre-war prices is not 100%, or

a 300% or 169%, or other large % on specific items as shown in the gas case and above cited.

Therefore, it is respectfully submitted that the 40% of increase figured by the court is excessive, and that such cost as one of the elements of value, should not have been stated by him at figure larger than 22.4%, (Bell case, infra); nor at highest more than 33 1/3%, (Galveston case).

The *50%* increase used in the Rand case should not be here used, to determine Reproduction cost, for the costs and percentage of costs are not the same. No proof of proper similarity of items is offered in the record.

Restating the relevant elements as to value we have

| | |
|---|---|
| Reproduction cost adjusted to eliminate cost of financing only and leaving Master's Going Concern Value undisturbed, as per *Bell Case* percentage | $4,528,554.63 |
| Original cost less cost of financing ($4,222,573 —$89,075) | $4,133,498.00 |
| Taxable value (full value in money) | $3,437,436.00 |
| Stocks and bonds face $3,719,882.00 depreciated 17% | $3,171,000.00 |
| Company's verified claim of value in contested tax proceeding | $2,700,000.00 |
| Comparison with Superior Division put at $1,225,000 | $2,933,730.00 |
| | $20,904,218.00 |
| Dividing by 6— Value *averaged* | $3,484,034.68 |

Total value as per market value of bonds (Rep. R. fol. 906, p. 741) is $2,187,803.24, add Plaintiff's Duluth stock at par (R.

fol. 906, p. 714) ($1,200,000) gives $3,387,803.24 as total of both bonds and stock.

Thus the Master's and Commission's value is *$1,900,000* more than the Company's officials claimed by affidavit its value to be in 1921 as its "full value in money" under the terms of the Minnesota Statute.

It exceeds the taxable value fixed by State Tax Commission at *"full value in money"* by ..... $1,163,000!
It exceeds the market value of bonds and stock (stock at par) $3,387,803.24 by..... $1,212,000!
It exceeds the actual total actual capitalization ($3,719,882) by..... $ 880,000!
It exceeds the comparative value $2,933,730, using the Railroad & Warehouse Commission of Wisconsin as a Judge, by..... $1,666,000!
It exceeds the capitalization, depreciated by 17% ($3,171,000) by..... $1,428,000!

Is it not safe to say the value at least ought not to exceed $4,599,978.22, under these stated facts?

Ought it not to be put under $3,800,000 as claimed by the City?

### 3. RATE OF ANNUAL RETURN

City's Exception No. I to Master's Finding No. V. (R. 725, subds. a, b, c, d); and City's Exception No. VI. Subdivision (2) (R. 730 f. 933).

If the counsel for the City and State, and also the counsel of the complainants are correct in their views on the point, it becomes essential for the Court in this case to supplement the

special findings of the Master touching the question of rate of return, rate of interest per annum and other relevant facts bearing on what is a proper annual rate of return on the fair value; and to make a specific finding upon this material and important point. Such action seems to be required by the rule of the United States Supreme Court in

Chicago, Milwaukee Ry. vs. Tompkins, 176 U. S. 167, 179, 180, 20 Supreme Court Reporter, 336;
Lincoln Gas Electric Light Company vs. Lincoln, 233 U. S. 349, 361, 365, 32 S. C. R. 271;
Rand case, 285 Fed. Rep. at p. 825.

Certainly the Supreme Court of the United States would be entitled to have the Master's and the Court's finding *upon a fact so* relevant to, and perhaps controlling in, the proper determination and conclusion of the whole matter. In this case it is difficult to conceive how any *single fact is more controlling than this fact of what is a proper annual rate of return* to the Duluth Street Railway Company upon its valuation, in view of the special circumstances existing in Duluth and vicinity involving locality, risk, and a return equal to that generally found, accruing to similar enterprises. This question is one of *"fact"* perhaps here as controlling and material as the fact of "value" itself. This is clearly shown by illustrations as follows:

1) Assuming the value found by the Commission and affirmed by the Master, to-wit: $4,600,000.

A 6% return on this value, as claimed by the City to be justified and required by the evidence, is but $276,000.

At a rate of return of 6½%, the total return allowed would be $299,000.

At a rate of return of 7% per annum, the total annual return would be $322,000.

And at 7½% the rate of return would be, as figured by the Commission $345,000.

The difference between annual return at 6% and at 7½% is an annual net income of $69,000! Certainly such amount of net income might determine the whole case. Or, at least, it would involve the ultimate conclusion in such uncertainty and doubt (from the plaintiff's standpoint exclusively) as to require the dismissal of the Bill without prejudice, in absence of an actual test, following the above quoted rules established by the Supreme Court of the United States (pp. 40-41 hereof).

Supposing the Court should take the attitude that a 6½% annual rate of return is not confiscatory, or that it exceeds the return current in Duluth on similar investments of capital. In such case a net income of $299,000 would safely and surely escape any possible charge of confiscation under the rules of the Supreme Court of the United States. So would the income derived from a 7% rate, because it would be $322,000 annual return. Now, when the Court takes even the Master's figures (tho' erroneously arrived at) as to the result of a flat 6-cent rate, viz., an amount in excess of $347,224, (Master's report, Rec. 722), it is seen that such return is *in excess*, not only of that fixed by the Commission at 7½%, but is *$23,000* further in excess at the 7% rate; and is *$46,000* further in excess at the 6½% rate; and is *$69,000* in excess at a rate of 6% per annum. These facts demonstrate that a flat 6 cent rate is not justified, and that the Master's recommendation was not justified, and that the conclusion of the trial court, herein appealed from, is not justified. It is herein shown at pages 104-125 that the Master's "Gross Revenue" is unwarrantedly low, *because based on utterly abnormal conditions.*

(2) Moreover, when also the *Master's figures of operating costs affirmed by the decree are further reduced*, as they should be, to a figure not exceeding $986,668 instead of $1,078,-671.42 the excess of net income at a flat 6 cent rate, is still

further magnified by *$92,000*; and, certainly it is believed that the Court will be compelled to further reduce the annual operating expenses as estimated by the Master in a sum not less than $92,000. The result of such action will swell the net revenues of the Company so far above that estimated by the Master, and by the court, viz., by $116,000 at a 6½% rate, as to make a conclusive demonstration that no confiscation was probable, or possible, under the schedule of fares fixed by the Commission of they had been allowed to operate; and that a flat 6 cent rate was extortionate.

(3) Moreover, all this too, is on the assumption that the *valuation* as fixed by the Commission and the Master should not be modified below $4,600,000; whereas the Court sees the claims of the City, and the reasons for it, that the valuation should be reduced by at least the sum of $800,000, which result, of course, would produce a conclusive demonstration that the schedule of fares fixed by the Commission was not confiscatory; and that the Bill should have been dismissed.

Therefore, counsel for the City in its exception to the Master's report Number VI. Sub-division 2, *requested from the Master a special finding of fact upon what was a proper per cent of annual return in Duluth upon the fair value of the property*, as a relevant and material fact, perhaps controlling to the issues.

The Master refused to allow this exception, saying "Judge Booth knows as much about this matter as does the Master;" and thus left it for the Court to decide.

It was the contention of the City that an annual percent of return of 6% upon the fair value could be legitimately found by the evidence; and in aid of the presumptions as to the validity of the rate, should be found; that it was *required by the evidence* considering the locality, risk and returns usually sought and obtained in Duluth and vicinity by enterprises as nearly similar to the Duluth Street Railway Company as the

nature of things would permit; that a return of 6% was equal to that generally sought and obtained in Duluth and vicinity at the time of the making of the Commission's order. Owing to the refusal of the Master to make a special finding upon this point, the matter came up to this trial court to do it; and the evidence is challenged as a basis for such finding.

The master did make important findings, bearing upon the point, as follows, to-wit: He finds that the rate of 7½% fixed by the Commission is *"at least sufficient and not to be changed at the suit of the plaintiff (R. 716)*. That is to say, his finding of fact is that in no case should the plaintiff be entitled to recover on the basis of an annual rate of return *greater than* 7½%.

But while this is favorable to the defendants and intervenor, *he refused to revise the rate downward* as claimed by the City and State, as justified by undisputed evidence; and it is because of this refusal that the defendant City of Duluth is now complaining.

Other important findings relevant to this point were also made by the Master at page 32 of his report in the language as follows (Fol. 917, R. p. 722);

> "Such return (i. e., $344,998.36) is fully adequate. Interest upon the outstanding bonds amounts to $125,994.10 leaving $220,702.83 to the Company and if distributed to the stockholders would give a return upon par value greatly exceeding 7½%.

The Master finds (R. 722, fol. 917):

> "Duluth is a growing and progressive city and because of its topography street car travel is comparatively heavy. The return, even when computed upon present value, *is higher than the legal rate of interest in Minnesota; higher*

*than the rate generally found in bonds or mortgages; and at least equal to the return obtained in enterprises of similar character.*"

The plain implication from the Master's last quoted clause is that such return of 7½ *is greater than the return in enterprises* at Duluth of similar character; and he clearly states that it is greater "than the rates generally found in bonds or mortgages," and "higher than the legal rate of interest in Minnesota," which rate is 6%.

The Master refused to make the specific finding requested, not because he thought the evidence did not justify the finding asked for by the City, but, because of his view of the law *that the Court had no power to change such 7½% rate fixed by the Commission;* that the Commission was acting in a *legislative* capacity at this point similar to the capacity in which it fixed a final schedule of rates (See Master's Report, (Rec. 716, at top, Rate of Return).

In this, it is confidently submitted, the Master was wrong; and that it was the duty of the trial court to make a finding on the special point; and that it must be decided in favor of the City's claim, materially reducing the annual rate of return below the 7½% fixed by the Commission as "just and reasonable". Moreover, this *Court is asked to conclude that there is a radical difference between a "confiscatory" rate and one that must be "just and reasonable" in the meaning of a statute or ordinance requiring it to be such.*

Banton vs. Belt Line Corp., 45 Sup. C. Rep. 534 and other cases herein cited at p. 97-98 hereof.

The two authorities cited by the Master, as basis for his said view of the law clearly do not sustain his said views (Rec. 716, Report).

The first case cited is I. C. C. vs. Cincinnati, etc. 167 U. S. 479. In this case the Court is discussing the matter of the actual *schedule of rates* fixed by the legislative authority, and is discussing nothing else, as a basis for its conclusion that the fixing of *such rates is a legislative* matter, and is not a judicial matter. Examination discovers no discussion of whether the matter of *annual rate of return* upon the fair value is or is not a mere question of fact; or whether it is or is not as such a judicial question. Much less can it be said that it determines that the declaration of a legislative board as to what would be a proper anual rate of return is conclusive upon any court. These facts lead counsel for the City to conclude that either the Master has made a miscitation of the particular case, meaning to refer to some other case not cited, or that the Master has misconceived the actual holding of the court in 167 U. S. 479.

As to the Rand case, cited by the Master, counsel for the City can see nothing in the said case which sustains the conclusion of the Master. On the contrary, it is submitted that the whole essence of the said Rand case involves the idea of the right of the Court to determine as a question of fact what should be a proper annual rate of return upon the fair valuation. If counsel for the City is right in this matter, it necessarily follows that the Master must be wrong.

As corroboration to the contention of the City in this respect, attention is called to paragraph 9 of 285 Federal 818, at page 830. In this paragraph the Court recognizes the distinction between a *gas rate* and the *basis* upon which it is fixed, for it says:

> "The Master fixed a gas rate, based upon an assumed rate of return therefrom to the owners of the Gas Company of 7½% on the value of the property and this is challenged by the City as excessive," i. e. "excessive" as more

than a "*just and reasonable*" rate. The case did not involve "*confiscation.*"

Here it is manifest that the Court is dealing with three separate and distinct things, one the "gas rate". This, everybody agrees is a legislative proposition when fixed, and secondly, two other things, to-wit: First, an assumed rate of annual return of a certain percentage; and third, the value of the property. Again, the Court recognizes that the annual rate of return is a matter of controversy depending upon the actual facts in the particular case, and recognizes the right of the respective parties to attack a stated rate of *annual return.* It does this by going into the respective arguments upon the proposition. The Court says, (Paragraph 9):

> "The only testimony as to the local rate of returns required for such investments at Minneapolis at that time shows that 8% would be required."

Then the Court goes into the question as to what constitutes the basis of such annual rate of return and quotes the Lincoln Gas case, 250 U. S. 256, and states:

> "The Court refused to approve a finding that a rate of 6% could not be regarded as confiscatory when the undisputed evidence showed that *8%* was the lowest rate sought and generally obtained as a return on capital invested in banking, merchandising and other business in the vicinity; *and that 7% was the legal rate of interest in Nebraska.*"

In the Dayton-Goose Creek case, 263 U. S. 456, speaking on the subject of what is a fair return, this Court says:

"The act fixes the fair return for the years here involved, 1920 and 1921, at five and a half per cent and the Commission exercises its discretion to add one-half a per cent. The case of Bluefield Water Works & Improvement Company vs. Public Service Commission, 262 U. S. 679, is cited to show that a return of six per cent on the property of a public utility is confiscatory. But six per cent was not found confiscatory in Willcox vs. Consolidated Gas Company, 212 U. S. 19, 48, 50; in Cedar Rapids Gas Light Company vs. Cedar Rapids, 223 U. S. 153, 172. *Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances.* Here we are relieved from *considering the line between a fair return* and *confiscation,* because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about eight per cent on the reported value. This can hardly be called confiscatory."

Decided Jan. 7th, 1924. 44 S. C. R. 169.

It is thus submitted that neither of the cases cited by the Master sustains his conclusions that the 7½% of annual return fixed by the Commission is a *legislative* declaration, not subject to judicial review; and not subject to change.

Moreover, attention of the Court, in this connection, is called to the fact that it seems plainly the intent of the Brooks-Coleman Act, Chapter 278, Laws of 1921 of Minnesota, that it be a judicial question as to what is the proper annual rate of return upon the valuation (See Section 10 thereof). That legislative declaration places the "rate of return" upon the same basis as the actual "value of the property." There is no difference. They are co-ordinate, in the same class, to be treated alike; *both* subject to the review of the court on appeal, after

the Commission has determined those two preliminary steps or bases upon which it should thereafter fix the final *"schedule of rates"*. It is this final "schedule of rates" alone that is a legislative act, and not subject to a judicial remaking. The Master failed to make the proper distinction and the trial court did not correct the error.

It is respectfully submitted that it is impossible to give effect to the reasoning of the Supreme Court of the United States in the Dayton-Goose Creek Ry. case, 263 U. S. 456 (44 S. C. R. 169), decided Jan. 7, 1924, the Wilcox Consolidated Gas case, 212 U. S. 19, and in the Bluefield case recently decided in 1923, and its citations, without reaching the conclusion that that court has determined that the question of what is a proper annual rate of return is purely a question of fact, depending upon special circumstances of each particular case; that it is a judicial question; that it is not a legislative act barring judicial review.

The following decisions of State courts, also, declare that what is a reasonable annual rate of return on invested capital is a question of fact; and that as such it is subject to judicial review.

In Duluth Street Railway Company vs. Railway Commission of Wisconsin, 161 Wis. 245, the Court said:

> "What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense."

This same language is adopted and approved by the Illinois Supreme Court in State vs. Springfield Gas & Electric Co. 291 Ill. 209, P. U. R. 1920, C. page 640, at page 650.

See also State ex rel. Bell Telephone Company vs. Public Service Commission of Missouri P. U. R.

1922A at pages 773 and 786; 233 S. W. R. 425 (Missouri), May 24, 1921;

Johnson County Gas case vs. Stafford (Kentucky), 248 S. W. R. 515, P. U. R. 1923C at p. 258 at top (1923).

In the last cited case from Kentucky the Supreme Court says:

> "It follows from this that the reasonableness of the rate and what is a fair return to the investor are necessarily questions of fact to be determined from the facts and circumstances in each case. The evidence in this case is *that a return of 7 to 8% is customary upon such investments at Paintsville and in that locality.*"

And especially see Waukesha Gas Co. vs. Commission, 194 N. W. 846 (Wisconsin) (1923).

It is claimed by the City in the present case that in Duluth and its vicinity such returns were shown by undisputed evidence to range from 5 to 6%; and 6% is also the legal rate of interest in the State of Minnesota. This fact distinguishes it from the Rand case, and from the facts in the Lincoln Gas case, 250 U. S. 256.

Such being the case this court, is asked to reach a conclusion that a rate of return of 6% per annum upon the fair value of the property is not confiscatory in Minnesota.

His Honor, Judge Booth, once asked the counsel for the City to define what was a *confiscatory* rate.

The Wisconsin Supreme Court has defined it as follows:

> "Before the Court can declare that a rate is unreasonably low *it must clearly appear that it will yield less than the minimum return which invested capital has a right to demand.*"

If this definition is sound, it requires, it is submitted, a dismissal of the present bill; because it cannot clearly appear that the rate of 6% per annum in Duluth and vicinity now or in 1921 was "less than the minimum return which invested capital has a right to demand." The Commission in its order specifically finds that "in recent months utilities have *"financed upon 6% basis and even less per cent basis" (R. 29).*

Again, what constitutes a "just and reasonable rate" has been defined. In 291 Ill. 209 supra, the Supreme Court puts the case thus:

> "The real test of the justice and reasonableness of any rate seems to be that it should be as low as possible, and yet sufficient to induce the investment of capital in the business and its continuance therein." P. U. R. 1920C, page 651.

When this Court declared, as it has done, in the Dayton-Goose Creek Ry. case, supra, that it is proper for the Government of the United States to limit the returns of railroads to 6½% per annum on the fair value of their property; that this does not violate any Federal Constitution right; the City of Duluth is certainly justified in asking this Court to say that, at least, an annual return of 6½% on the fair value of the property of the Duluth Street Railway Company is not *"confiscatory"*.

Figuring its income on such basis of 6½%, it is clearly seen that its revenues would be adequate, requiring a dismissal of this Bill. 6½% on the Commission's and Master's valuation is *$299,000.*

Said decision upholds the Transportation Act known as the Esch-Cummings Law so limiting by the so-called *"recapture clause"*, the returns of the steam railroads of the country to 6½%, on investments of $18,000,000,000, or more.

Also, when the Interstate Commerce Commission, acting under authority of the same Act of Congress, has determined that a return of 5¾% per annum upon a fair valuation is a reasonable rate of return on the railroad investments of the country, is it not impossible to hold that a rate is confiscatory which will give 6% as a minimum on invested capital? Surely so. And yet 6% upon a fair value of even $4,000,000 only amounts to *$240,000 per annum.* Whereas the Master finds, (Rec. 722 of his Report), under excessive allowance of operating *cost, and upon abnormally low revenues,* that $347,000 annually would be received under the flat 6c rate, viz., *$107,000* more than is a fair return at the rate of 6% upon a fair valuation of the property; and *$48,000 in excess of a return 6½%.*

Do not these facts conclusively show that the recommendation of the Master should be set aside and that the Bill should be dismissed?

One word as to what this Court said in the Lincoln Gas case.

The *refusal* by the Court to find, under the special circumstances of that case that no rate yielding as much as 6% upon the invested capital could be regarded as confiscatory is explained by the Court itself as based on the "undisputed evidence accepted by the Master that *8% was the lowest rate sought and generally obtained on the capital invested in banking, merchandising and other business, 7% being the legal rate of interest in Nebraska.*" It also took acount of the enhanced costs. Those war costs have now receded.

In that case, too, the Bill was dismissed "without prejudice."

Such holding manifestly does not support the decree here appealed from. It is not a holding that a return of as little as 6% in Duluth to the Street Railway Company would be confiscatory; for here 6% instead of 7% is the legal rate in Minnesota; and the war prices current in 1919 when the Lincoln case was decided have greatly receded; the Street Railway Company has a monopoly; and fair return is practically guaranteed to it by the Brooks-Coleman Act; *and capital is shown by undisputed evidence as willing to take 6% or even less in the financing of such enterprises, as is distinctly found by the Commission itself in its order filed herein, as above quoted.*

The Bluefield case also is plainly, radically different in its facts and circumstances from those of the case at bar.

Here, dividends were constantly being paid and had in 1920 reached the sum of $1,300,000 or more, City Ex. A. p. 4.

4. OPERATING COSTS AS FOUND BY THE MASTER, AFFIRMED BY THE COURT, SHOULD BE FURTHER REDUCED IN A SUM NOT LESS THAN $92,003.35 AND PUT AT $986,668.07, EXCLUSIVE OF TAXES.

This would increase the net revenue to like extent.

City's Exception V. (Rec. 727-730); and Point No. 12, Subdivisions A to H inclusive, of above statement of reasons for dismissal. (pp. 35-36 hereof).

The Master's estimate of $1,078,671.42, exclusive of taxes, should be further cut to $986,668.07.

On such corrected basis a flat 6c rate would, even with the unwarranted estimate of revenue passengers, as per Master's Report, (Rec. 716-718), produce a net annual revenue of more than $408,710, or 8.8% on the Master's valuation of $4,599,978.-22, aside from 2½% for annual depreciation, or *11.3%* total annual net income.

This fact demonstrates the impropriety of the Master's recommendation of a 6c flat rate affirmed by the decree. It is extortionate, unfair and unjust to the public.

Adjustment is made along the lines herein stated as follows, and recapitulation on page 102 hereof.

1) Subdivision 4, of Exception No. V. and Point 12, Subdivision A. The annuity for depreciation is excessive by not less than $27,824. It was allowed at $115,000 by the Commission. The Master says of this:

> "If an allowance for depreciation is intended to restore investment, the Commission computed depreciation upon an excessive amount. But in any event $115,000 is *sufficient*." (R. p. 719, (b).

It is clear that the Commission adopted an erroneous basis on which to calculate its allowed rate of annual depreciation, 2½%, or $115,000.

The error of the Commission, challenged, but adopted by the Master as seen and not corrected by the trial court, consists in allowing annual depreciation of 2½% on a total valuation of $4,600,000 (2½% of that sum=$115,000). Such valuation, included:

| | |
|---|---|
| Land | $ 140,000; |
| Overheads | 550,000; |
| Goin concern value | 500,000; |
| Power Contract | 110,000; |
| Materials and supplies | 105,000; |
| Working capital | 30,000; |
| The total of these items is | $1,435,000. |

But such depreciation can be properly figured on none of these items and on no part of the said total of $1,435,000. 2½% on that total is $35,875.50, thus erroneously allowed by the Commission.

If the Commission had, therefore, used its 2½% only, after deducting from its stated value the said $1,435,000, it would have reached, as depreciation annuity, instead of $115,000, the figure of $79,124.50.

The Master used different figures in his estimate of original cost and of reproduction, as to value of land, value of overheads, going concern value, eliminated anything for the Power Contract and added an item of cost of financing put at $89,075, but, as seen, he adopted the $115,000 fixed by the Commission, though challenging it.

It is perfectly clear that annual depreciation cannot be allowed on land, or on material and supplies, or on working capital, or on cost of financing, or on going concern value. It also cannot be allowed on "overheads".

Annual depreciation is properly chargeable only on *depreciable property,* and not otherwise.

In this case this means that annual depreciation is allowable only on the sum of $3,487,020 (agreed cost of inventory), Basis No. 4.

The corrected amount of *annual depreciation* then would be 2½% upon said figure which is $87,175.50. The difference between this amount and the amount allowed by the Commission and adopted by the Master and court is the sum of $27,-824.50. It is respectfully submitted that this sum of $27,824.50 should be deducted from the $1,078,671.42 fixed by the Master and approved by the court as annual operating costs exclusive of taxes.

Deducting the said excessive amount leaves the sum of $1,050,846.92 to be further reduced, infra.

Authorities requiring the elimination of "overheads" in estimating annual allowance for renewals and replacements, are,

Galveston Electric Co. vs. Galveston, 258 U. S. 388, P. U. R. 1922D-159;

Galveston Electric Co. vs. Galveston (U. S. Dist. Ct.) 272 Fed. 147, P. U. R. 1921D-547-548-

In re Great Falls Gas Co. (Montana) P. U. R. 1922D-385.

A clear statement of the reasons why the depreciation annual cannot be allowed or estimated *upon overheads and other intangibles* is shown by District Judge Hutcheson in the Galveston case, Galveston Electric Co. vs. City of Galveston reported February 10, 1921 in 272 Fed. p. 147, at pages 170-171, P. U. R. 1921D-547-548. He uses the following language:

"On the other hand, when the matter of establishing the depreciation annuity is considered, the analytic process is employed, and the sum total of the value of the plant is resolved into its constituent items making up the whole which are susceptible to depreciation. Under the influence of this process *it is clear that the overhead items must be discarded in arriving at the annual depreciation allowance.*

"That this disposition is sound as to such items as interest during construction, organization expense, law expenses, etc., admits of no doubt, because under no kind of theory could they be supposed to be subject to depreciation, and what doubt might arise with reference to the propriety of including engineering charges in these figures is at once dissipated when it is considered that the property will not be constructed again as an entirety, but is to be kept up by annual renewals from time to time made, so

that engineering, and other such overheads caused by the assembling of the plant, will not have to be provided against, because they will not be again incurred.

"In short, while, if the object of the depreciation annuity were to provide a fund sufficient at the end of a period of years to replace the plant as an entirety, the percentage ought to be figured on the entire cost of the plant, including the overheads necessarily incurred in assembling, *since the object is otherwise, and merely contemplates the provision of a fund out of which annual renewals and replacements can be made*, none of these items ought to be considered in arriving at the annuity rate, for the same organization which runs the plant, the expense of which is provided for, and takes care of the renewals.

"The result of these views requires the complete rejection by the court of the figure of $1,300,000, taken in the original opinion as the basis for the 4 per cent depreciation annuity, and the substitution therefor of the correct figure, $1,000,000."

This Court approved said finding in 258 U. S. 388, supra.

In the Great Falls case above cited the Commission says at page 439 under the head of Depreciation Annuity:

"(14) The sum of the various operating expenses as computed above must be increased by the allowance of normal values for depreciation and return in order to determine the amount to which the Company is fairly entitled in revenues. This allowance is generally expressed in a percentage of the depreciable property, *and practice assumes the physical property only to depreciate. Overheads are therefore eliminated.*"

The Commission then proceeds to quote Judge Hutcheson in the Galveston case as authority and adopts his reasoning. It is submitted as conclusive on the point.

No contest should be made over the percentage allowed for annual depreciation stated at 2½%.

It was the rate approved by the Commission and by the Master. It was the rate approved by the constant practice of the Company itself, as clearly shown in the evidence. See City Ex. A, p. 7 and K. pages 5, 6, last column, (original filed by stipulation). It averaged $63,058 per year as shown by Mr. Gifford (Record, p. 423, para. A).

Also it accumulated an amount at time of Commission's order *in excess of the actual depreciation (17%)* found to exist on the property as a whole.

The accumulation was 19.7% of the investment (McWethy, Record p. 679 at top); or as stated by the Commission "in excess" of 20% of the total present "value" (Report of Commission, Rec. 28, fol. 39). See City's Ex. W (Graph) original files.

Thus no successful claim can be made for a rate of annuity *greater than 2½%;* and no successful defense can be made against the City's claims that under the law, the Commission erred in the sum of $27,824.50 in its estimate of annual depreciation, for it should have been $87,175.50, and not $115,000; and the Master's said perfunctory adoption of the Commission's error affirmed by the trial court should be corrected by this Court to do even justice to the parties.

2) City's Exception V, No. 6; Point 12, Sub-division b of above Statement, and See Master's Report p. 28, Subdivision A as to item of $42,158.69.

The Master finds as follows:

"A. During the last eight months of the year ending July 21, 1923, the plaintiff, *without asking or receiving*

*authority from the City, increased the number of cars upon one or more of its lines, increasing the car miles operated by approximately 253,207, and at an increased operating expense of approximately $42,158.69.*" (R. p. 719 at top).

The attack of City and State is on the Master's allowance of $42,158.69 for expense of operation of said car miles 253,207, viz., those operated on "*regular*" schedule, 8 hours each day, (R. p. 645) put into effect by the Company on the West Third Street line, without legal authority and never since approved, to counteract the enormous invasion of jitney busses, operating at a 5 cent fare, after the Company's 6 cent flat rate went into effect under the injunction.

The Master shows that this was done by the plaintiff "*without asking or receiving authority from the city.*"

The resolution of the City Council fixed the schedule to a 10-minute service on that line. (R. p. 653 at top). The Company secretly put into effect a 5-minute service causing said extra expense. (R. 645).

The facts were first known and established through cross-examination on the trial before the Master, after repeated denials, evasions, and equivocations in attempt to conceal the facts.

The City challenges said action as a potential fraud upon the rate payer and City government, as wholly illegal, and defiant of a fixed "schedule and standard of service", put into force by legislative authority to protect the public against undue operating costs and to thereby preserve a reasonable schedule of fares.

The State also challenged this expense, (R. p. 652) on the special ground that the Commission's order was on trial; and that it was made on its theory of operating costs based on the "fixed standard and schedule of regular service," adopted by

the City Council of Duluth, and unchanged by such authority; whereas plaintiff was here adopting its own increased schedule at the stated unauthorized, illegal and excessive cost of $42,-158.69, *a basis or element of operating costs never before the Commission, and not contemplated by its order.* (Record, p. 652).

It is respectfully submitted that the Master was wholly in error in not deducting this sum from his estimate of normal operating costs, as requested in the briefs of City and State; and the trial court erred in not correcting it.

As matter of fact the trial court affirmed each item of operating costs, according to the figures submitted in the Master's Report (opinion, 4 Fed. (225) 543 at p. 550.

Exclusive power and authority is given to the City Council of Duluth *"to fix and amend service schedules;"* to adopt *"standards of service." "The action of the Council of any city under this section shall be final and not subject to appeal by any Street Railway."* See Sec. 4, Chapter 278, Laws of Minnesota 1921, "Brooks-Coleman Act".

The Company, secretly, deliberately and defiantly chose to violate the "schedule" of 10-minute service and doubled it to a 5-minute schedule, plainly a "regular" schedule and expressly admitted to be *"regular"* in the evidence (Record P. 641 at top 645).

Can such action be successfully defended in this proceeding, alleging "confiscatory" rates; so as to claim normal operating costs by this additional $42,158.69? If so, it must be done on the theory that it is *permanent schedule,* although made in flat violation of the fixed legislative schedule and never approved. Can this properly be done by the Master or a Court?

It is respectfully submitted that it cannot properly be done; and that this item must be deducted from the estimates of operating costs of the Master and trial court.

The present counsel for the City was the author of the resolution of the City Council fixing said schedule and standard of service. It was done at a time necessary to enable the Railroad & Warehouse Commission to properly estimate operating costs as a basis to establish rates of fare in the case then pending before it, because prior to August 1st, 1921, no action under said Section 4 of the Brooks-Coleman Act had been taken; and otherwise it could not be known what the schedule was, or its annual cost.

The purpose of "fixing" the schedule was to control operating costs and keep them to proper limits; so as not to reach such high figures as to furnish excuse for increased or excessive fares. It is manifest that control of schedules by legislative authority is necessary in the public interests. That control was exclusively in the City Council of Duluth. To sustain the Court's allowance of this $42,158.69 as *"normal"* operating cost is to assume that such change of regular service is to be *permanent;* and also that the Company was justified in ignoring or defying the City Council's authority in the matter. It is to say as a precedent, *that the Company can make its own schedules* without legislative control. This surely cannot properly be done. If it can be done in one instance, it can in all cases. This is inconceivable. The result would destroy proper control by the Council.

Two ideas of the Master on this point are subject to criticism, viz.,

1) His idea expressed that the intent of the resolution of the City Council of August 1st, 1921, was to establish, not a *"maximum"* of *"regular"* service, but merely a *"minimum"* of *regular* service (Master's Report p. 719), As shown above the exact contrary was the case.

2) His idea is expressed that any act of the plaintiff if done *"in good faith"* (p. 719) should stand approved.

This rule must be qualified by the statement that such act *must not be in violation of legislative authority, i. e. of law.*

In this case, such was the act. It was done, to be sure, on advice of counsel; but advice of counsel does not excuse violation of law. No notice or application to the City Council was given or made. It was done secretly, not on any published schedule, and was unknown to any member of the Council.

The counsel for the City offered City's Ex. "Z" in evidence at the hearing before the Master. It was rejected. The City asks this Court to receive in evidence this "Ex. Z"; or if it is deemed in itself incompetent to allow presentation of oral evidence of members of the City Council which passed the resolution of August 1, 1921, showing its purpose to be that claimed in this brief. The Galveston case, supra, is ample authority for such action.

Certainly an item of $42,158.69 as *operating costs* unauthorized by sole legislative authority, is of an importance as affecting results here sufficient to justify a little evidence before the court itself, for it means an item of increased revenue of same amount. This sum alone, deducted from the Master's and Court's estimate of annual operating costs, is deemed sufficient to overthrow the Master's and Court's recommendation. Making reduction then of said sum of $42,158.69 from the balance just above stated, $1,050,846.92, leaves *$1,008,688.23.* This to be further reduced as follows:

3) City's Exception V item 10; (R. p. 730); point 12, Subdivision C of above statement. As to attorney's fees in this pending Federal litigation, Judge Booth in the Winona Gas case, supra, disallowed such items.

The Master and Court allowed $3,000 in operating cost estimate for such attorney's fees. The full charge for such fees was $15,000. The Master allowed it, but amortized it into fifths, viz., $3,000 per year and reduced the expenses by $12,000 only (R. 719).

The whole theory of such allowance is wrong and against public policy. To approve it would be to encourage and foment Federal litigation. It is against all precedent, which is that parties pay their own attorney's fees, except where express statute allows counsel fees to be charged. No state law of Minnesota allows such charge. "Statutory costs" in the sum of $10 is the limit there in cases of all kinds, though millions may be involved. It seems absurd to claim that these attorney's fees in Federal court are a *"normal"* operating annual cost.

If the plaintiff prevails in its present action it will recover what are proper taxable costs and no more. But these taxable costs in Federal court do not provide for payment of attorneys fees necessarily incurred by the parties. The amount of such allowance in the United States Supreme Court as "statutory cost" is, we believe, the large sum of $20.00 and no more.

Reducing the Master's estimate still further by this third item adds $3,000 more to the net revenues.

See also authorities cited below on next point under head of *"rate making expenses."*

4) City Exception No. IV. Item 7; (R. 729); Point 12 of above statement, Subdivisions C and D. Items of Rate making expense, $11,415.24; attorneys fees $3,000; and amount paid to Commission $1060.

The Master and Court allowed as proper annual operating cost the sum of $11,415.24, the 1/5 part of a total of approximately $57,000 incurred in the valuation proceeding before the Commission.

The Commission had so allowed it, as an expense to be provided for in fixing its schedules of rates; and Mr. McWethy included it in his own estimates of returns (Com's Ex. CC, p. 42-50). No fault can be found with such action of the *Commission in so discharging the duty incumbent on it* in determining what was "just and fair and reasonable" as to rate of return.

*But the situation is radically different here in Federal Court, where the question is, not whether the rates are "just, fair and reasonable" in order to comply with the Statute requiring them to be such.* Here the sole question is, "Is the operation of the fixed rate *'confiscatory?'* "

The duty of Commission and the function of the Federal Court are entirely different, governed by different rules.

That there is a difference between a "confiscatory rate and a rate which under contract or statute must be "just and reasonable", seems to be thoroughly established by the decisions of courts Federal and State, and is founded in reason as well as authority.

Banton vs. Belt Line Corp., 45 S. C. R. 534.
Galveston Electric Co. vs. Galveston, 258 U. S. 388, Par. 2.
Newton vs. Consolidated Gas Co. of N. Y., 258 U. S. 165,

where the Court says: "It seems proper to add that we do not intend by anything said herein to intimate what would have been a reasonable rate for the sale of gas under the circumstances disclosed. The 80c rate was confiscatory." (Last paragraph of opinion).

Minneapolis vs. Rand, 285 Fed. 818
(Circuit Court of Appeals 8th Circuit, Par. 9)
Duluth St. Ry. Co. vs. Railroad Commission, 161 Wis. 245,

where it is said: (pages 262-263): "The duty of the Commission is to fix a reasonable rate rather than a non-confisatory rate."

Union Pacific Ry. Co. vs. Public Utilities Commission, 95 Kans. 604,

where the Court says: "Unreasonable, unjust, oppressive and unlawful rates *are not synonomous with confiscatory rates.*"

See valuable note in 53 L. R. A. pp. 5-66, 1915A, covering all phases of confiscation and difference between it and reasonable rates, especially subdivision 3 and notes on page 21, et seq.

Waukesha Gas Co. vs. Commission—Wis. 194 N. W. 846

State Commission vs. Springfield Gas Co. 291 Ill. 209.

AUTHORITIES DIRECTLY IN POINT, FEDERAL AND STATE TO THE EFFECT THAT EXPENSES INCURRED IN RATE HEARINGS ARE NOT TO BE ALLOWED AS OPERATING COSTS IN A SUIT INVOLVING THE QUESTION AS TO WHETHER THE RATE IS CONFISCATORY. They are *abnormal.*

The situation of a Commission fixing a rate under the Brooks-Coleman Act, and of a court in a *confiscation case,* is seen to be radically different.

Reno Power Light & Water Co. vs. Public Service Commission of Nevada, P. U. R. 1923E-485, page 500, decided June 4, 1923, and cases cited; 300 Fed. Rep. 645.

New York & Queens Gas Co. vs. Charles C. Newton, P. U. R. 1921A-530 at p. 535 (Nov. 3, 1920); 269 Fed. R. 277.

Winona vs. Wisconsin-Minnesota Light & Power Co. 276 Fed. 996, 1005 P. U. R. 1922C, 461, decided by *Judge Booth,* disallowing legal expenses in confiscation suit.

Kings County Lighting Co. vs. Lewis, 180 N. Y. Supp. 570, 586, 591, P. U. R. 1922D, 145.

In the Reno case above cited United States District Judge Farrington, dissallowing $8594.94 as expenses of *rate hearings*, says:

> "Such items are deemed to be *abnormal* and are not entitled to consideration in determining whether rates are confiscatory."

In the New York & Queens Gas Company case vs. Newton, above cited, United States District Judge Mayer at page 535 says as to "*expenses of litigation*":

> "These were also excluded by the Master, but were allowed by the Court in Consolidated Gas Co. vs. Newton, 267 Fed. 231, P. U. R. 1920, F. 483, I should follow the decision on this point of the Consolidated Gas case were it not that *I am firm in the conviction that while this item may properly be charged in fixing a rate, it is not to be included in determining whether the rate is confiscatory.* I agree with the Master both in this conclusion and his reasons therefor."

While the Commission itself, under the terms of the Statute, might properly include such expense as an operating expense, by amortization, in ordinarily fixing a rate, the situation is entirely different when attack is made upon the rate by suit in Federal Court charging that the rate so fixed is itself confiscatory. From the very nature of the case it is seen that the expenses of a valuation are abnormal; and usually, even when allowed by a Commission, are only run for a few years and then cease to be an expense at all. So here, in the course of next year, 1927 this item disappears. On the theory that a valuation is not to be changed very often, it is confidently submitted that a Federal Court is not justified, *in a confiscatory*

*rate case,* in considering any expenses of a valuation as a normal, ordinary expense of operation. This point operates to cut the operating expenses as allowed by the Master, and to increase the net revenues correspondingly, in the sums as follows:

$11,415.24 as general amortized annual expense of valuation; it eliminates $3,000 allowed by the Master as amortized expenses of litigation in the Federal Court as attorneys' fees; it also eliminates a charge of $1060, expenses paid to the Commission; total $15,484.00. These items added to the net revenue would of themselves, place the net revenues, on the basis of a flat six cent rate, so much in excess of 7½% return on the Commission's valuation or even the trial court's valuation, as to demonstrate the injustice of it and to require the dismissal of the plaintiff's bill, at least without prejudice. (See Master's result of $347,224.39 on 6 cent basis, Report p. 722).

Also, in the Reno case Judge Farrington says:

> *"(15) Finding as I must that the revenues of the Company for the year commencing April 1, 1921 are unusually low and the operating expenses abnormally high, it is unfair to use them as presented in determining whether the rates prescribed by the Commission are confiscatory."*

The justice of this conclusion is obvious, and equally applies to the situation in Duluth.

Thus, further deducting said $15,484.00 from the last figure above reached as to items 1, 2 and 3, viz., $1,008,688.23 we reduce the Master's and Court's estimate of cost to ($1,008,688.23 —$15,484) $993,204.23.

This is to be further reduced, see next items.

5) City's Exception V Subdivision 8; (R. p. 729); Point 12, Subdivision E.

Item of Snow and Ice, $9,341 which was *$4341 in excess* of the allowance made by the Commission, viz., $5000.00, as normal expense.

The Company claimed to have spent *$9341* for snow and ice removal, Account No. 12.

The evidence clearly shows this amount to be *unusual and extraordinary*, and no fair measure of a normal cost.

For 8 years, 1914-1921, inclusive, the average cost was, a/c 12, *$4994.09* (Com's Ex. CC., p. 6, original in file). In 1921 it was *$3535.72* (Com's Ex. CC., a/c 12, p. 3, original in file). The Commission in adjusting and estimating operating costs as basis for its order fixed the "normal" annual amount at *$5,000.* No sufficient evidence exists in the record to overthrow the *considered judgment of the Commission as to such item.* This is a fair instance of where full effect is to be given to the considered judgment of an impartial Board, fixing a "normal" cost.

*Actual* cost in a particular and unusual year, as seen from all the authorities above cited herein, is not the measure of operating costs, but the usual, ordinary and fair average over a sufficient period of years to form a reasonably sure basis. By this test, $5,000 only should be allowed. But the Master by refusing so to do, allowed $9,341 or nearly double the usual sum required for that purpose. This extra $4,341 should be deducted from his said estimate.

See Commission's Ex. CC., p. 42 a/c 12, on file, and Mr. McWethy's explanatory testimony (Record pp. 544-5).

6) City Exception V, Subd. 9 (R. 729); Point 12, Subdivision F, (p. 36 hereof).

Account 15, Excess of expense on Bridges and Culverts, is $2203.92 in excess of the usual and normal.

This fact of excess over the fair annual expense for that purpose was established by the undisputed testimony of Mr.

McWethy (Commission's Ex. CC., p. 42 and explanatory testimony) (Record pp. 544-545).

Thus, it is confidently submitted the Master's and Court's estimate of normal annual operating costs should be reduced by deduction of the following items as above set forth, viz.:

| | |
|---|---|
| By excess annuity depreciation | $27,824.50 |
| By illegal increase of regular schedule | 42,158.69 |
| By attorneys' fees in Federal Court | 3,000.00 |
| By rate making expenses | 11,415.24 |
| By payment to Railroad & Warehouse Commission in rate making | 1,060.00 |
| By excess allowance for Account 12, snow and ice | 4,341.00 |
| By excess allowance for Account 15, Bridges and culverts, etc. | 2,203.92 |
| Total reduction to be made | $92,003.35 |

As the Attorney-General stated in his brief filed with the Master, it is far more than likely that many other items of expense occurred in excess of normal, which were not detected or disclosed in evidence, operating to the disadvantage of the public in this investigation.

But at least the Master's estimate and Court's allowance of $1,078,671.42, as annual operating costs should be further reduced to the extent of $92,003.35 as above shown. It should, therefore, be fixed by this Court at not to exceed the difference, viz., *$986,668.07 ($1,078,671.42—$92,003.35), exclusive of State and Federal income taxes.*

Instead of the table on page 31 (R. 722) of the Master's report under "Adequacy of Return," a new one should therefore be made with proper adjustments. Assuming, *for the present only,* the Master's figures as to *revenue passengers* at 6 cents, the new and corrected table would thus appear:

| | | |
|---|---|---|
| 25,384,100 revenue passengers at 6 cents | | $1,523,046.00 |
| Other revenues | | 15,202.62 |
| Total revenue | | $1,538,248.62 |
| Operating expense | $986,688.07 | |
| Taxes, state | 81,351.29 (Master's report p. 721) | |
| | $1,068,039.36 | 1,068,039.36 |
| | | $ 470,209.26 |
| To find Federal tax; From this | $470,209.26 | |
| Deduct 5% interest on $2,519,882.00 bonds apportioned to Duluth System, viz., | 125,994.10 | |
| | $344,215.16 | |
| Upon this 12½% is $41,305.81, instead of $31,001.65 as per Master's figures | | $ 41,305.81 |
| Net return is | | $ 428,903.45 |

This is in excess of 9% on the valuation found by Master and Commission at $4,599,978.22! It is also 8.56% on the increased valuation, $5,009,510, fixed in the decree! But the said valuations are excessive as above shown. Also the rate of return of 6% at Duluth is not confiscatory, especially when 2½% additional is allowed for yearly depreciation. Such figures conclusively demonstrate that the recommendation of the Master and the Court should not be followed. Such net return is far above the $345,000, stated by the Commission to be "just and reasonable", with 2½% allowed for depreciation it reaches the total of 11½% on the Master's valuation, and 11.06% on the Court's valuation. In endeavor to avoid confiscation, extortion on the public is thus perpetrated.

*5. The Commission's Considered Judgment as to the Net Revenues to Accrue From its Schedule of Rates Could not Properly be Overthrown by the Recommendation of the Master Approved by the Trial Court.*

For such recommendation was based upon mere conjectural estimates founded on conditions extraordinary, unusual, and abnormal, resulting in a sudden reduction of 3,300,000 revenue passengers below the average for the three preceding years, 1919, 1920 and 1921; also, where the actual schedule of rates fixed by the Commission never went into effect, being barred by the Federal injunctions.

Positive and persuasive evidence in this record supports and confirms the considered judgment of the Commission.

This court will note that the Master's value was the same as the Commission's, namely, $4,599,978.22; also that the Master advised against any increase of the Commission's 7½% as annual return. The trial court raised the value to $5,009,510.00, but such raise, so far as the schedule of rates is concerned, could not materially affect the questions involved.

It is respectfully submitted that vital and reversible error occurred in the action of the Master, approved by the trial court, in failing to follow the recommendation, estimates and schedule fixed by the Commission; that their conclusions are not justified by the evidence, and are irreconcilable with the rules of this court many times declared, requiring clear and satisfactory proof by complainant that legislative rates are in fact confiscatory; and the decree should be set aside.

The careful attention of the Court is invited to the facts herein stated as follows:

As to gross revenues, the rates never having been tried, they were manifestly involved wholly in speculation and uncertainty.

But every presumption of fact and of law favors the estimates and judgment of the Commission as a fairminded tri-

bunal, while such uncertainty exists and until Plaintiff has proven "*necessary* confiscation", under the settled rules of the United States Supreme Court above cited, a *final* injunction must be refused. See authorities cited at pp. 40-41 hereof.

The Master says:

> "The defendants and intervenor insisted that the period so taken did not furnish a proper test for the reason that the Commission's rates, never having been put into operation, no sufficient test had been, or could be made as to their effect." (R. 718).

He then says: "*In some respects this contention is true.*" But he concludes that the year furnished some light on the question of "*operating costs*" (R. p. 718). We agree to this, but it does not aid plaintiff; for reasonable certainty on one relevant fact, viz., "*operating costs*", does not supply lack of such certainty on all other relevant facts, or on "gross revenues"; and such lack here exists. Speaking of one item of estimate of probable revenues, he says:

> "*This estimate is probably excessive but in the absence of a practical and fair test, any estimate must be more or less conjectural.*" (R. p. 718, 2nd para. from top).

It is obvious that no estimates offered by plaintiff's single witness, its own manager, to overthrow the rates established by the Commission, could be anything else than mere "conjectures" and "speculations", "in absence of a practical and fair test" of the rates.

It is at this point that the Master's recommendation and the decree appealed from, conflicts squarely with the rules of this Court, as set forth in the authorities cited in the first branch of this brief at pages 40-41 hereof, the Wilcox and Knoxville cases, and all the rest, Federal and State.

The fact that 25,384,100 revenue passengers (Report p. 716) were carried in the said 12 months' period cannot be controlling, nor even persuasive, *as to what the number would have been under normal conditions of operation of the rates; for the conditions in said period were revolutionary and utterly abnormal, a complete change from former conditions for 40 years* in Duluth.

Judge Farrington says in the Reno case, supra (p. 98 hereof):

> *"Finding as I must that the revenues of the Company for the year commencing April 1, 1921, are unusually low,* and the operating expenses abnormally high, *it is unfair to use them as presented in determining whether the rates prescribed by the Commission* are confiscatory."

This language and conclusion are strikingly apt as applied to the figure of 25,384,100 revenue passengers referred to by the Master and used as basis for his recommendation for the injunction here appealed from. This aptness of conclusion is seen at a glance when comparison is made with the average number of such passengers carried in Duluth in the years *1919, 1920 and 1921. Such average was 28,702,571* (Warren's testimony p. 310 of Record). Thus 3,300,000 less were carried in said last 12 months under this injunction that the average of the previous three years! *How comes this enormous discrepancy?*

Also, *1921* was a year of financial depression in Duluth, even reaching the proportions of an industrial slump. The largest industries were closed and thousands of workers were unemployed, and general economy was enforced by the citizens. Yet even under such circumstances in 1921 the Company carried *27,246,916* revenue passengers. On the contrary. the said 12 months' period, *1922-1923 was one of general em-*

*ployment, of business and industrial activity and of marked increase of population.*

The City Charter of Duluth of which this court takes judicial notice, contains provisions based on annual increase of 2.6% in population above each preceding year. Assessment for taxes rests on a per capita basis, using such annual percentage of increase as its base (Amendment of January 1923).

The Master finds:

> "Duluth is a growing and progressive city and because of the topography, street car travel is comparatively heavy." (R. p. 722, fol. 917).

The fair question then arises: With increased prosperity, with increasing population, with topography forcing increased traffic, why should the number of revenue passengers be less in 1922-1923 than in 1921, (a year of depression) viz., 27,246,-916? Or why should it fall below the *average* of 1921, 1920 and 1919, viz., 28,702,571? *No good reason can be advanced why the annual number of revenue passengers should not have been 28,702,571, if the legislative rate fixed by the Commission had been allowed to go into effect, i. e. 6 cents as cash fare, and five (5) tokens for 25 cents.*

The testimony of Mr. McWethy, statistician and engineer of the Commission, and a most trustworthy and competent witness, is as follows: after his adjustments, as to operating costs, up to time of his testimony.

> "Q. (Mr. Richards). I will ask you: this result that you get, leading to an adjustment which gives you 8.7% *on the Commission's valuation, I will ask you if that represents your best judgment of the effect if the Commission's order had been allowed to go into effect uninterfered with by Federal injunction? A. It does.* Q. And for the

reasons heretofore stated and shown in these exhibits, Commission's Exhibt CC? A. It does." (P. 583 Record). See also his testimony immediately preceding.

Does the biased speculation of the Vice-president of the St. Ry. Co., sole witness for complainant on this point, Mr. Warren, make out a *"clear case of confiscatory rates"* in the face of such testimony of Mr. McWethy, a most competent and trustworthy witness? Surely not so.

Mr. McWethy further testified: *A. "Well, it is my opinion, if I get your question correctly that the installation of the Commission's fare would have very little effect on the number of passengers that would be carried under a five cent fare, due to the fact that, with the tickets in effect, more passengers could be handled in the same space of time, more easily, that the riding conditions would be better; and it is my opinion that under the Commission's rate of fare, the number of revenue passengers would have been decreased very little if any over the number of passengers which would have carried on the five cent fare. Now, if the Company's estimate of 4% decrease with the six cent fare in effect is correct, then my assumption here is right."* (R. p. 557).

Again on (R. p. 558) he says:

"I think that with the placing of the ticket rate in effect, the reduction which would come about by the six cent fare, would be more than made up by increases in the ticket fares; so that in my opinion even with the 33 1/3% cash and 66% tickets, there would be very little reduction in street railway travel over street railway travel at a straight five-cent fare."

"Q. You think the tickets would be pretty popular?

"A. I think they would be popular to the extent of about 66 2/3." (R. p. 558).

As shown, the *admitted* average number of passengers for the three (3) previous years was 28,702,571. Again on next page, cross-examination continued, he says:

"A. Yes, it is my opinion that with a ticket rate in effect, the ticket rate of five cents in effect, the jitneys would not have a chance to be the competitive factor which they have developed into." (R. p. 559, fol. 714 at end).

At page 684 Record, fol. 865, he says:

"Well, it so happens that the average of all these companies, and there are *seventy-two companies,* and the straight arithmetical average of the percent of riders who pay cash was 33.59%; and riders who rode on tickets was 66.41%."

His conclusion was expressed as follows: "We believe that with this data at hand it establishes, as far as it can be established, that the Commision's estimate of 33 1/3% split for cash fares, and 66 2/3% for tickets in Duluth, is a fair and reasonable estimate." (R. p. 576 at top).

This would produce an average fare of 5 1/3 cents. 28,702,571 fares @ 5 1/3 cents=$1,530,803.78. Add *"other revenue"* (Master, R. p. 717) viz., $15,202.62 and gross revenue is $1,546,006.40. This exceeds by $138,411.88 the Master's estimate ($1,407,594.62) of gross revenue, (R. p. 717).

When the Commission's statistician and engineer, Mr. McWethy, stated as above that the Commission's rates in operation on its valuation would in his judgment, on his adjusted

operating cost produce a net income of 8.7% per annum (R. p. 583), his answer, *was also made on assumed operating costs, higher than those to be allowed.* The following additional items should be deducted from Mr. McWethy's statement of costs, thus adding to net return, viz.:

1) The $42,158.69, cost of illegal increasing of regular schedule on West Third Street as above shown. *This fact had at time of his quoted statement had not been disclosed to Mr. McWethy, and was therefore not in Mr. McWethy's mind or estimate. It was later disclosed in evidence.*

2) He had also made no deduction in his said conclusions for the *"Rate making expenses"* allowed by the Commission, viz., $11,415.24; or the $1060 paid to the Commission; nor the $3,000 attorneys fees of in Federal Court.

If these items were considered in connection with his testimony, it would necessarily raise his estimate from 8.7% to a higher one. The amount to be so added is $56,633.93 ($42,158,-69 plus $11,415.24 plus $1060 plus $3,000). So treated, on the basis of his considered and sworn opinion the annual return to the Company from the Commission's rates if tried, would have been in excess of *9.7%*, to be exact, it would be (8.7% plus 1.2%) *9.9% plus!* It was his belief that if the option to the public to ride for 5 cents (5 tickets for 25 cents) had been preserved, and not destroyed, by the injunction issued, the raise of the cash fare to 6 cents would not have decreased the riding; that the same number would ride as before; that the invasion of the jitney busses would not have occurred; and his table (Com's Ex. CC, in file) shows in detail his basis. The detail underlying this statement is shown on pages 47-50 of said Commission's Ex. CC. and pages of Record 580-583.

It may be asked, why is not this sworn opinion of such a man, entitled to weight by this Court? Is it not entitled at least to as much consideration and given as much weight, as

that of the sole witness Warren, plainly a biased estimater, as Vice-President of the plaintiff?

And what of the weight to be given to the judgment of the Commission itself?

In the face of this sworn opinion, bolstered by the specific facts presented in its support, viz., that 8.7% would have accrued, (9.9%) can it be said fairly or properly that plaintiff by the evidence has made out a "clear case", "a very clear case", a "flagrant attack" on property rights of the plaintiff, a case of confiscation, requiring injunction? Does not the weight of evidence, as well as all legal presumptions, require confirmation of the act and rates of the Commission? Where is the "certainty" of confiscation? Where is the "necessary result" of confiscation? Does plaintiff produce such evidecne? What becomes of the rule of Burden of Proof? What has happened to the Rule of "Every presumption is in favor of the legislative rates?"

It seems at this point that the Master, followed by the court, without due cause, clearly went astray. They failed to follow the wise landmarks of the law. The Master should, having adopted the Commission's value, and its 7½% return, also have refused to inferentially charge the Commission with unfairness in its judgment as to the effect of its rates. He has failed in every finding to convict them of either unfairness, or of "error in judgment" or of "error in prophecy" as to results. He was merely speculating and conjecturing.

The Georgia case, supra, and cases cited in it.

This loss of *3,300,000* revenue passnegers *below the average of those carried in the three previous* years is so remarkable as to show abnormal conditions; and it is not "fair", as Judge Farrington states, to set aside considered legislative rates on abnormal conditions shown, nor where the year shows "unusually low revenues," or "exceptionally high costs."

Reno case, supra.

This astonishing and abnormal shrinkage in one (1) year below the record of *1921, when the same "standard of regular service" was required by law,* was (27,246,916 minus 25,384,-100) *1,862,816!* This even in face of increased population, and of the passing of the period of business depression of 1921. This also in face of the fact shown herein below that 1,015,272 more revenue passengers went to entertainments on cars in *irregular* service in said 12 months than in 1921.

This enormous discrepancy and extraordinary situation requires explanation. It is found in the destruction of the right of the public to buy 5 tickets for 25 cents; but more especially in the exasperation of the public against the Company *over the history and manner in which it was done.*

*First,* great resentment arose over the passage of the Brooks-Coleman Act, after the Duluth public had in two successive elections in 1920 refused to submit to a flat 6 cent fare. They blamed the Company for the passage of the Act which put the matter of fares into the control of the State Commission.

*Then,* especial resentment was aroused when the Company, repudiating its agreement with the city and state, went into the Federal Court, refusing to trust the justice of its case to the State courts, by appeal to the district court and the State Supreme Court on questions of value and of proper rate of return, as questions of fact, and as by it agreed to in Sec. 10 of the Act.

The combined result of this hostility, and of the cheaper rides furnished by jitneys rushing in resulted in the immediate and enormously successful invasion of those jitney busses, operating for 5 cents.

Prior to August 1st, 1922, the jitney competition was negligible, not exceeding 600 revenue passengers per day *and none*

*existed prior to 1921.* This if carried throughout the year would only mean 219,000 passengers or $10,000.

But when it reaches proportions in 1 year reducing the revenue passengers from 1921 by *1,862,816;* or, especially when the flat 6 cent rate cuts the *average of the three previous years* (even under the new conditions of general increase of population and prosperity) by the sum of *3,300,000* revenue passengers, the condition becomes extraordinary indeed, and wholly abnormal. The situation cannot be laid to automobile use. The Commission's order cannot, fairly, be judged on such unusual and extraordinary terms. But the Master did so, and the trial court did likewise. It should be judged under *normal* conditions, as shown by previous experience, properly projected into the future.

Such was the basis of the judgment and estimates of the Commission. *They were carefully made, with entire impartiality, and close analysis of conditions, after full and fair hearing, and elaborate oral and written arguments of the parties, represented by counsel;* and the cash fare was raised 1 cent.

The order of the Commission itself and the testimony of Mr. McWethy and others, show how critically all factors were examined, both of value, and of operating costs, and of estimates of revenue (See Commission's Ex. CC pp. 1-50 and Mr. McWethy's explanatory testimony). The care and diligence and patient dissection and analysis are nothing less than remarkable.

The Master and trial court however fell into the error of judging by abnormal conditions, and solely on the sudden and extraordinary fall in number of revenue passengers. He says, "Had the expectations been fulfilled, it is entirely possible the rate would have been found adequate. But during the 12 months period ending July 31, 1923, the plaintiff actually transported only *25,384,100 passengers.*"

That is to say, his view is that if the judgment of the Commission had been confirmed by actual experience, the plaintiff could find no fault. Complete answer to his fallacy is, it was at once enjoined even before it could take effect, by its terms, i. e. 13 days prior to Aug. 1, 1922, that it had no chance to be tried out. The Master, however, approves the Commission's ideas as adequate, and as fully intended to comply with the Statute and to give the Company a "just and reasonable rate of return," and "just and reasonable rates" as prescribed by the Statute. Indeed, he specifically finds (R. p. 72) that the contemplated net income of $344,998.36 is fully "adequate". In the connection used he certainly means this expression to be taken in the sense in which the Commission was using it, i. e. "adequate" to comply with the provision of the Statutes. Apparently, however, he wholly lost sight of the proper test in his reasoning and conclusion, applied to the Federal and State courts in a "*confiscation*" case. The test in the court, to avoid confiscation of property, is radically different from the test of a Commission or court as applied to the meaning of an "*ordinance contract*", or statute, requiring "just and reasonable" rate of return, or "just and reasonable" rates.

> Minneapolis vs. Rand, 285 Fed. supra, and the numerous Federal and State Decisions on the point cited at page 97 hereof.

7½% might produce a return "just and reasonable," where 5¾% or 6% or 6½% as a basis would be approved by all courts as not causing a confiscation of plaintiff's "*property.*" It is the "property" of a certain value of which the Company cannot be deprived. It is not a particular *income* that must be guaranteed. Income may be figured on various bases of annual return on the value of the "*property.*"

> Dayton-Goose Creek Ry. Co. vs. U. S., etc., 263 U. S. 456, supra.

The Master applied his reasoning to the 12 months of absolutely abnormal conditions above shown (3,300,000 less passengers than they averaged for the previous 3 years), as a test of the 5 1/3 cents average fare, (not allowed to operate) calculated by the Commission to be derived from its fixed schedule of rates.

As stated by Judge Farrington in the Reno case, and as is perfectly obvious, such a test, and such reasoning under such circumstances is wholly unfair and unjust to the public and must be rejected. First, destroy the schedule fixed by the Commission. Fix it so 3,330,000 less revenue passengers ride than ordinarily ride and 1,862,816 less than in the immediate previous year (also one of depression and slump in Duluth). Then when such extraordinary condition has been produced use the 5 1/3 cent average fare approved by the Commission and figure for result. This is reasoning in a vicious circle. It is a mere begging of the whole question at issue. It is throwing the patient into "fits," in order to get a certain result.

Is it any wonder that the result should turn out as the Master made it (R. p. 717 Record), viz., a result of gross revenue of $1,407,594.62 only, instead of the $1,460,834.10, as the Commission calculated? Or a shortage on its hopes of $52,879.48? Such method of reasoning is wholly inapt and unfair; for it is based solely on extraordinary and abnormal conditions; and where no practical and fair test of the legislative rates has been had, or was possible.

Yet, *even taking the result thus reached by the Master, and followed by the Court, it is submitted that when properly tested by other relevant facts, it still reaches a net income sufficient to withstand attack as being "confiscation of the property of the plaintiff."!*

The Master's said calculation left $1,407,954.62 as gross revenue, or $52,879.48 below the Commission's estimate of

| | | |
|---|---|---|
| Gross Revenue under its schedule. Now put this (R. 717) to the test of other relevant facts, viz., | | $1,407,954.52 |
| From this deduct *proper* yearly operating costs, exclusive of taxes (as above) | | $986,668.07 |
| Net income exclusive of taxes | | $421,286.45 |
| Deduct State taxes (R. 721) | | 81,351.29 |
| | | $339,935.16 |
| Now ascertain and deduct Federal Income tax | $339.935.16 | |
| Deduct bond interest | 125,994.10 | |
| | $213,941.06 | |
| 12½% on this is | | 25,672.91 |
| Net income | | $314,262.15 |

This is on the *Master's basis at page 717, R.*

This does indeed fall short of the "just and reasonable" statutory estimate of the Commission by approximately $30,000.

But we are dealing here, not with a "just and reasonable" rate, but with a return that is *confiscatory of the plaintiff's property,* under the Federal Constitution.

The said net return of $314,262.15 *exceeds 6.8% on the value found* by the Master and Commission. 6% is $276,000.

Even on the Master's erroneous basis of revenue passengers above used with proper operating costs it is thus demonstrated that the $314,262.15 will give a net income of $15,262.15 *in excess of a 6½% return* on the full valuation. It is exactly 6.8% on the valuation approved. If a 6½% return or *6.8%* is

not confiscatory, *then the Master's own findings conclusively demonstrate that the plaintiff's case fails on proper operating costs;* that his recommendation fails; and that injunction should be denied. Especially so, if his *valuation* is too high! Using the trial court's valuation of $5,009,510, makes little difference in results, a difference not at all material.

*The Commission had indeed,* as found by the Master (R. p. 716 Revenue), *estimated* that under conditions existing in Duluth 2/3rds in number of the passengers would ride for 5 cents (5 tickets for 25 cents, and that 1/3rd would pay cash, i. e. their estimate provided for an average fare of 5 1/3c (Record p. 568, 569, 575-576, 577, 684). *This judgment of an impartial tribunal is supported by facts and by testimony.* If the 12 months ending July 31, 1923, throws light on *"operating costs", it also throws light on the percentage of those paying cash in Duluth and those who have bought tickets.* To be sure the tickets were 5 for *30 cents with contingent rebate of 5 cents,* as provided by amendment to interlocutory injunction, i. e. it was a contingent 5 cent fare purchase.

The undisputed evidence is that far the greater bulk of riders paid the cash fare of 6 cents. The percentage is about 70% paying cash and 30% buying tickets. In July 1923, 22.16% only were buying the tickets and 77.84% were paying cash 6c (Record p. 281, Warren).

These facts tend to corroborate the Commission's estimates and to overthrow the pessimistic and extravagant theory of the plaintiff on the point.

The Court will not fail to note the undisputed testimony of Mr. McWethy in reference to this point, and to the showing in 72 cities of the United States (Record pp. 684, 683; and pages 557, 558, 559, 583, 575-579 Commission's Ex. EE, original in files).

*The average number of passengers in the 72 cities who pay cash is the 33.95% while the average number buying tickets at a*

*net less rate, not only at 5 cents, but every variety of rate and combination, is 66.41%* (Record p. 684 at top, McWethy).

This evidence is a direct, persuasive and convincing basis to support the views of the Commission as to results of an average 5 1/3 cent fare under its schedule. *It is not here a case of mere lack of evidence, to support the order attacked.*

It is thus affirmatively supported by positive evidence. It is attacked merely by speculation and biased estimate of the Vice-president of the Company. As against the average showing of the 72 cities (see blueprint, Commission's Ex. EE, in files) under all combinations of cash and ticket rates, plaintiff produces one instance only, that of Columbus, Ohio, to support its extravagent speculations.

This is referred to by the Master at R. page 716. He says of it: "This estimate is probably excessive, but in the absence of a practical and fair test any estimate must be more or less conjectural," Among the 72 cities Columbus was one of two that has a 6 cent cash fare and 5 tickets for 25 cents like Duluth. Marion, Ohio, however, is another of similar schedule. (See Blueprint Exhibit Com's EE. on file). Those who paid cash in Marion were *36.8%* of the total. Those who bought tickets were *63.2%*. (Record p. 575). It chances to be less in Columbus. No similarity of general conditions to those in Duluth were shown to exist. Its split is unlike that of Marion. Why not adopt Marion's record in place of that of Columbus? It is all conjectural as to what the actual result in Duluth would have been if tried, and no trial was permitted. No fixed rule exists under all curcumstances (McWethy p. 576 at top). *It was the considered judgment of the Commission that the average result in the principal cities of the United States was a safe guide.* It is the sworn opinion of the Statistician and Engineer of the Commission, Mr. McWethy, that such a percentage would approximately have accrued in Duluth. He says:

"We believe that with this data at hand, it establishes, so far as it can be established, that the commission's estimate of 33 1/3 split for cash fares, and 66 2/3rds% for tickets in Duluth, *is a fair and reasonable estimate.*" (R. p. 576 at top).

It was the record in Marion, Ohio, on the same schedule. It is the average split under all kinds of schedules in 72 cities. Nothing but conjecture is advanced against this estimate and such considered judgment of the tribunal charged with the statutory duty, of fixing rates. It is peculiarly a case for the application of the rule of the United States Supreme Court that a legislative rate cannot be set aside and enjoined on conjecture, nor in any but a clear, a very clear case of confiscation; and that if "just or reasonable doubt" exists, the courts will not interfere until the rates have been tried. In his recommendation, the Master, while admitting necessity for estimate and mere conjecture seems not to have followed the guidemarks so laid down. He fails to give effect, on the controlling question of "Gross Revenues," to the presumptions in favor of the untried rates. He failed to properly appreciate the means of information and the considered judgment of the Commission and their manifest fairmindedness. And the trial court likewise so failed.

The Master said:

"Any estimate must be more or less conjectural; the tests, however, are sufficient to demonstrate that the Commission's estimates were erroneous and distinguished the showing here from that made in Georgia case, 43 S. C. R. 680." (Report p. 718, i. e. 262 U. S. 625).

It is respectfully submitted that such statement on its very face puts plaintiff's case in a class requiring dismissal "without prejudice."

But when the Master's apparent basis for said statement is searched for, it leads to nothing but mere estimates based concededly on conjectures; and on conditions clearly shown to be extraordinary and wholly abnormal, and, so, improper to be used, in absence of a proper test of experience, before overthrow of the Commission's order as void.

Paraphrasing the language of the United States Supreme Court in the Georgia Case and here applying it, it would read:

> "In making these changes the Commission fixed a rate which it estimated would permit the company to earn a return of 7½% on the fair value of the property. Each change of rate was made upon careful consideration. If there was error it was error in prophecy or error in judgment in passing upon the evidence. We cannot say that the evidence compels a conviction that the rate would prove inadequate, much less "confiscatory".

Lastly, (Points No. 14 and 15 supra). The experience of the 12 months ending July 31, 1923 brought to light another significant, even controlling fact, strongly supporting the Commission's order, and even showing that its own estimates were too low and conservative; and that its estimate ought to have been *28,262,188 instead of 27,030,000.* Such result would have produced better than a net return of 8%, with 2½% additional for annual depreciation.

It is respectfully submitted that the undisputed evidence requires a conclusion that at least *1,015,272 more revenue passengers used the street cars in the said 12 months period, than in 1921,* IN ATTENDANCE UPON SPECIAL ENTERTAINMENTS, THEATERS, CONCERTS, BALL GAMES, CONVENTIONS, ETC., UPON CARS NOT OPERATING ON "REGULAR SCHEDULES," BUT ON CARS PERFORMING WHAT WAS ALWAYS KNOWN AND PERMITTED AS "SPECIAL" OR "EXTRA" SERVICE.

general business activity and resulting general prosperity besides the marked increase in population. There was less exacting economy, as compared with the industrial slump, closing of plants, and great extent of unemployment and general depression of the year 1921. There was increased freedom of expenditure and greater use and demand for such special entertainments especially in the evening.

The situation is shown that 126,909 more car miles were called for and used for this special and *irregular* service than in 1921.

The "regular" or legal prescribed schedule, as fixed by the City Council was the same in both years, and is still the same. It has not been changed by the Council which has exclusive right to change it (Sec. 4, Brooks-Coleman Law).

The Master finds that 253,207 more car miles were run in the 12 months than in 1921 (p. 719 Subdivision a). 199,090 of these car miles, in excess of those in 1921, is positively explained and identified by the Manager of the Company as being exclusively used as follows (Record p. 659-660, 655): When people go on *regular* schedule to entertainments involving assembly of great numbers of people, from which they are to be returned, the conductors notify the Company's office of the numbers brought. Estimates are then made of the required number of cars to carry such people home, and they are supplied. They are often in waiting to be refilled by the people coming from those assemblies. This is called "special" or "extra" service, as distinguished from the fixed schedules. The practice is well known and well understood.

The number of 1,015,272 revenue passengers above mentioned is reached by dividing the total number of passengers carried in the year by the number of car miles operated in the year. This gives the number of revenue passengers for each car mile. In 1921 it was 8. 3,283,232 (car miles 1921 (R. p. 654

This result is accounted for by improved conditions of employment, resumption and enlargement of industrial plants, at top) divided into 27,246,916 (number revenue passengers 1921, Co's Ex. 35 in files) gives 8 plus.

Now multiplying 126,909 by 8 gives 1,015,272 (number of revenue passengers). It is perfectly evident also, as common experience and observation shows, that such cars are packed, and standing room is scarce; whereas it is not so much so on the "regular" fixed times of running.

This fact is pursuasive, also, that *more than 8 passengers to the car mile* are carried in such *special* service cars. So that the above estimate of 1,015,272 carried in such cars in said 12 months more than in like service in 1921 is really too conservative. It should be considered as larger.

If, in reply to this, it is said that such assemblies are partially served by cars on "regular" schedule time; that some of the overflow is taken on by cars coming upon fixed schedule, the answer to it is that such also was the case in 1921. But, notwithstanding similarity of these conditions in the two said years, yet, the increased demands required 126,909 more car miles than in 1921; and this means that not less than 1,015,-272 more revenue passengers were carried in said 12 months in such special months in such special runs than in 1921. It is confidently submitted that no other legitimate conclusion than this can be reached. The facts are shown by undisputed testimony. Discussion is challenged on this point.

Where does this lead to?

In 1921 (a year of depression) 27,246,916 revenue passengers were caried, Co.'s Ex. 35, in files. The said 12 months, on the contrary was a period of general prosperity, resumption and enlargements of industrial plants and little unemployment and the population was constantly increasing. Is it not reason-

able then, to suppose, if the option of the people to ride for 5 cents had not been destroyed, that at least as many as in 1921, would have ridden on the fixed and regular schedule? It is not only reasonable, but it is morally and mathematically certain that the number would not have been less. Such is McWethy's sworn stated o4pinion (Record 557, 558, 559).

Take this number then, 27,246,916, and add to it the number of 1,015,272 in excess of those in 1921, *who attended those entertainments* and the *total is 28,262,188!* Is this not a certainty? Indeed, it does not reach the average number carried in the three previous years 1919, 1920, 1921, which was 28,702,-571 (Warren Record p. 310, answering Master's question).

It falls short of such average by 443,383. What are the reasonable probabilities? In this "growing and progresive city whose topography gives a comparatively heavy street railway traffic," in the Master's language, is it unreasonable to claim that in 1924, the same number would on like rate have been, or be, carried *as was the average of those three years?*

At least, was there any "clear" evidence, is there any "certainty" that such would not be the result? Proper burden of proof, proper proof of confiscation, requires some clear and satisfactory evidence to overcome such facts as these Plaintiff does not furnish it.

28,262,188 at 5 1/3 cents average fare and proper operating expenses would give result as follows:

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| 28,262,188x5 1/3 cents equals | $1,507,316.69 |
| Add other revenue (Master's Rep. R. 717) | 15,202.62 |
| | $1,522,519.31 |
| Deduct *proper* operating expenses as per pages 86-103 hereof | 986,668.07 |
| | $535,851.24 |

| | | |
|---|---|---|
| Deduct State taxes as per Master (R. 721) | | 81,351.29 |
| | | $454,499.95 |
| Deduct Federal Tax found as follows | $454,499.95 | |
| Deduct Interest on bonds as per Master's (R. 721) | 125,994.10 | |
| | $328,505.85 | |
| 12½% of this is Federal Income Tax | $39,420.69 | 39,420.69 |
| *Net Income is* | | *$415,079.26* |

It is respectfully submitted that under operation of the Commission's rate if allowed to operate under normal conditions and fair costs, the annual net income of the plaintiff would not have been less than such figure, *$415,079.26.*

It is 9% on the Commission's valuation. When depreciation annuity of 2½% is added it reaches *11½%.*

It is 8.28% of the trial court's valuation of $5,009,510, or with 2½% annual depreciation 9.78% thereon!

In the Geary case, 244 U. S. supra, the United States Supreme Court said, assuming "fair valuation and fair operating costs":

> " It is *obvious* that 6½% of return above depreciation charges is not confiscatory."

In the recent Dayton-Goose Creek Ry. case, supra, it reached the same net result.

Let us apply this test to the plaintiff's claims and to the Master's valuation.

6½% on *$5,009,510* equals $325,618.15. The above table showing net return of $415,079.26 (figured on a reasonable basis) exceeds such result by $89,461.11.

No legislative rates could be set aside on such a showing.

6½% on a valuation of $4,600,000 is $299,000; or *$116,079.26 less than would reasonably have* accrued to the Company under said fair table, viz., $415,079.26.

6½% on the Commission's and Master's valuation thus *escapes* charge of confiscation with a leeway for safety of not less than $116,079.26.

But, as shown, it cannot be successfully claimed by plaintiff that *6%* is confiscatory.

6% on $4,599,978.22 is $276,000.

6% on $5,009,510 is $300,570.60.

The return would exceed this by $114,508.66.

Yet 5¾% is held to be a reasonable rate of return on *$18,000,000,000* of railroad property under rules of the Interstate Commerce Commission.

Thus by all tests, the Commission's order is not properly subject to attack as confiscatory and void; and the decree should be reversed, at least "without prejudice" for a fair test of the legislative schedule fixed.

Respectfully submitted,

JOHN B. RICHARDS,

City Attorney of Duluth and
Attorney for City of Duluth.

Sept. 30, 1926.

## APPENDIX

## MINNESOTA STATUTES RELATING TO APPEALS FROM ORDERS OF RAILROAD AND WAREHOUSE COMMISSION

Sections 4650-4651, General Statutes, 1923.
General Statutes, 1913, Sections 4191-4192.

4650. Proceedure for appeals to district court from orders of Railroad and Warehouse Commission.—Any party to a proceeding before the commission, or any party affected by any order thereof, or the State of Minnesota, by the attorney general, may appeal therefrom to the district court of the county in which the complainants, or a majority of them, reside, or in case none of them reside in the state, or in a proceeding commenced by the commission on its own motion without complaint, to the district court of one of the counties in which the order of the commission requires a service to be performed or an act to be done or not to be done by the carrier or warehouseman; or in case of train service, to the district court of one of the counties through which the train runs, at any time within thirty days after service of a copy of such order on the parties of record, as in this charter provided, by service of a written notice of appeal on said commission, or on its secretary. Upon service of said notice of appeal, said commission, by its secretary, shall forthwith file, with the clerk of said district court to which said appeal is taken, a certified copy of the order appealed from, together with findings of fact on which the same is based in case appeals are taken to the district court of more than one county, they shall be consolidated and tried in the district court of the county to which the first appeal was taken. (R. L. Chapter 4191, amended '07 c. 167 Chapter 1; '17 c. 291 Chapter 1) *(4191)*.

4651. Proceedings on appeal—Orders not appealed from—The person serving such notice of appeal shall, within five days after the service thereof, file the same with proof of service, with the clerk of the court to which such appeal is taken; and thereupon said district court shall have jurisdiction over said appeal, and the same shall be entered upon the records of said district court and shall be tried therein according to the rules relating to the trial of civil actions, so far as the same are applicable. The complainant before the commission, if there was one (otherwise the State of Minnesota), shall be designated as complainant in the district court, and the carrier or warehouseman as defendant. No further pleadings than those filed before the commission shall be necessary. Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If said court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable it shall be vacated and set aside. Such appeal shall not stay or supercede the order appealed from unless the court, upon an examination of said order, and the return made on said appeal, and after giving the respondent notice and opportunity to be heard, shall so direct. If such appeal is not taken, such order shall become final, and it shall thereupon be the duty of the carriers affected to adopt and publish the rates of classifications therein prescribed. And all orders heretofore made, from which no appeal was taken, as provided by law, shall be deemed to have been in full effect for all purposes from the time when the right to appeal from such order expired. *When no appeal is taken from an order, as herein provided, the parties affected by such order shall be deemed to have waived the right to have the merits of such controversy reviewed by a*

*court,* and there shall be no trial of the merits of re-examination of the facts of any controversy in which such order was made, by any district court to which application may be made for a writ to enforce the same. (R. L. Chapter 1972, amended '07 c. 167 Chapter 2) *(4192).*

Section 10 of the Brooks-Coleman Act, modifies the above in vital respects, and substitutes *new* provisions, as shown in Brief; and under it the statutes above printed, are to be used *"so far as the same are applicable"* (Sec. 10).